

N. 9840

No. 13959

United States
Court of Appeals
for the Ninth Circuit.

VICTOR GOTHBERG, an individual doing business as GOTHBERG CONSTRUCTION COMPANY,
Appellant and Appellee,

vs.

BURTON E. CARR, JANE DOE CARR, his wife, JACK AKERS and SHERMAN JOHNSTONE,
Appellees and Appellants.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 376, inclusive)

Appeals from the District Court for the Territory
of Alaska, Third Division

FILED

DEC 4 1903

PAUL P. O'BRIEN



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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

E. L. ARNELL,

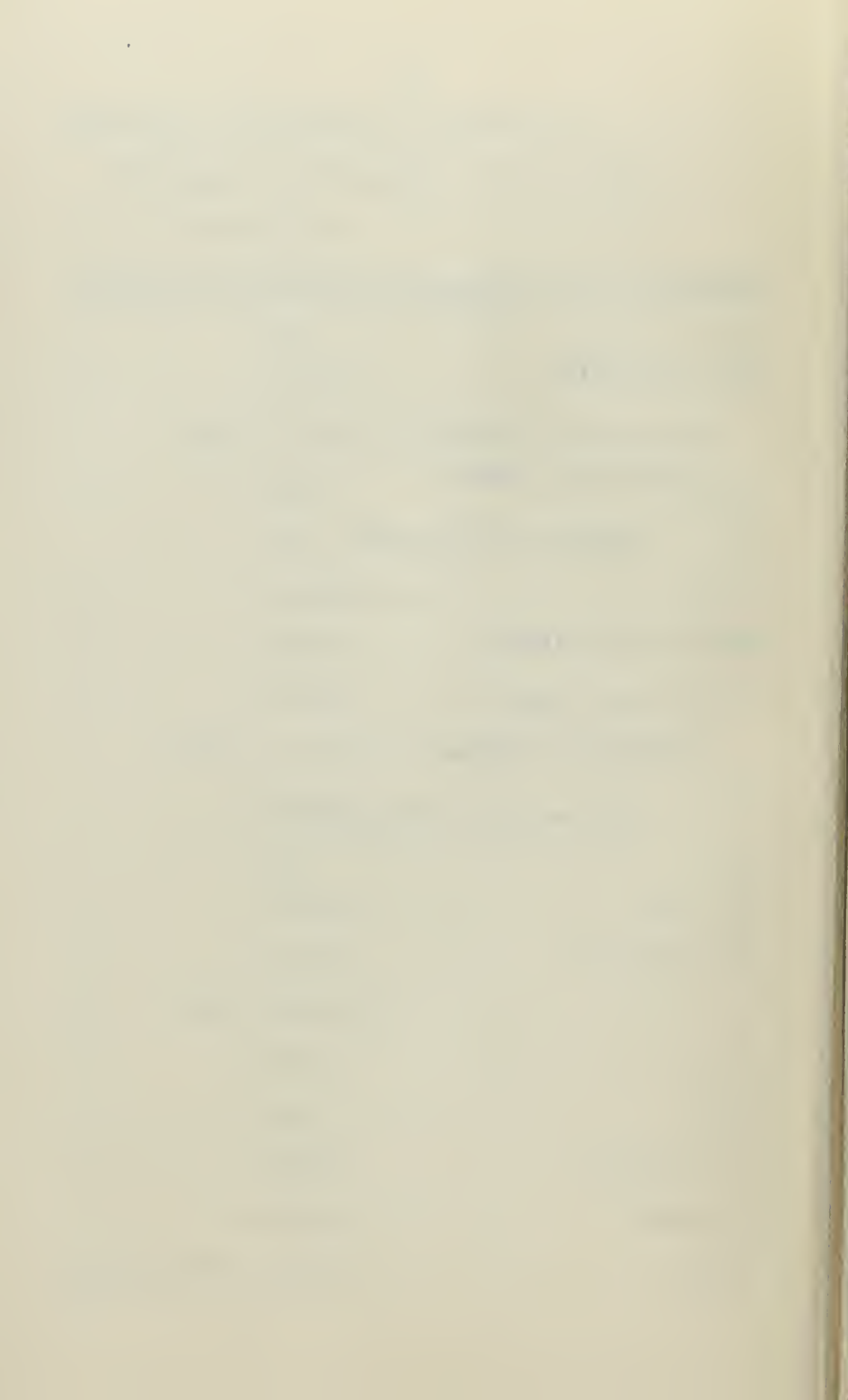
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Attorney for Plaintiff.

BELL & SANDERS,

P. O. Box 1599,
Anchorage, Alaska,

Attorneys for Defendants.



In the District Court for the Territory of Alaska,
Third Division

No. A 7644

VICTOR GOTHBERG, an individual doing business as GOTHBERG CONSTRUCTION COMPANY, Plaintiff,

vs.

BURTON E. CARR, JANE DOE CARR, his wife, JACK AKERS and SHERMAN JOHNSTONE, Defendants.

COMPLAINT

Comes now the plaintiff above named and for his first cause of action against the defendants complains and alleges as follows:

First Cause of Action

I.

That the plaintiff is an individual engaged in a general construction and contracting business doing business under the firm name and style of the Gothberg Construction Company.

II.

That at the special instance and request of the defendants the plaintiff constructed a foundation for the building now located upon Lot One, Block Twenty of the East Addition to the original town-site of Anchorage, Alaska; that pursuant to the provisions of the written contract entered into between the parties on or about the 1st day of Oc-

tober, 1950, the agreed value of the work performed by the plaintiff is in the sum of \$4051.84.

Second Cause of Action

And for a second cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants the plaintiff constructed a garage building which is now located upon Lot One, Block Twenty of the East Addition to the original townsite of Anchorage, Alaska; that pursuant to the provisions of the written contract entered into between the parties on or about the 1st day of October, 1950, the agreed value of the work performed by the plaintiff is in the sum of \$38,450.00.

Third Cause of Action

And for a third cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants the plaintiff performed interior finish work upon the building now located upon Lot One,

Block Twenty of the East Addition to the original townsite of Anchorage, Alaska; that pursuant to the provisions of an oral contract entered into between the parties for such work the agreed and reasonable value of the work performed by the plaintiff is in the sum of \$5,351.74.

And for a fourth cause of action the above named plaintiff does complain and allege as follows:

Fourth Cause of Action

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants the plaintiff performed additional work in accordance with a change order according to specification paragraph CC-15 of the written contract entered into between the parties on or about the 1st day of October, 1950, the agreed value of which is in the sum of \$3,925.58.

That by reason of the above work performed the defendants were indebted to the plaintiff in the sum of \$51,779.16.

That the defendants have made payment to the plaintiff upon said indebtedness the sum of \$34,605.00, leaving a balance due and owing in the amount of \$17,174.16.

That the plaintiff has made demand upon the defendants for the payment of said sum; that the defendants have failed and refused to pay said

sum or any part thereof, and now the whole of said indebtedness is owing from the defendants to the plaintiff.

Wherefore, the plaintiff prays judgment against the plaintiffs and each of them as follows:

1. For the sum of \$17,174.16, together with interest thereon at the rate of eight per cent per annum from the 1st day of March, 1951.
2. For the costs and disbursements of this action, including attorneys' fees, incurred by the plaintiff.
3. For such other and further relief as the Court may deem proper in the premises.

PLUMMER & ARNELL,
/s/ By RAYMOND E. PLUMMER,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 4, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION TO GIVE MORE AND BETTER BOND

Now at this time hearing on motion to give more and better bond in Cause No. A-7644, entitled Victor Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, came on regularly before the Court, Edward L. Arnell, appearing for and in behalf of the

plaintiffs, and Bailey E. Bell appearing for and in behalf of the defendant.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendant.

At this time Court continued cause to 4:00 o'clock p.m. of Wednesday, April 30, 1952.

Entered April 28, 1952.

[Title of District Court and Cause.]

M.O. OF CONTINUANCE

Now at this time upon motion of Raymond E. Plummer, of counsel for plaintiffs, and with Bailey E. Bell, of counsel for defendants not objecting thereto,

It Is Ordered that Cause No. A-7644, entitled Victor Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, heretofore set for 4:00 o'clock p.m. this date be and it is hereby, continued to 1:30 o'clock p.m. of Thursday, May 1, 1952.

Entered April 30, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION TO REQUIRE MORE AND BETTER BOND CONTINUED

Now at this time came the respective counsel as heretofore and hearing on motion to require more and better bond in Cause No. A-7644, entitled Victor

Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, was resumed.

Reporting Waived.

Argument to the Court was had by Edward L. Arnell, of counsel for plaintiff.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendants.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, announced it would reserve its decision in this cause.

Entered May 1, 1952.

[Title of District Court and Cause.]

M.O. RENDERING ORAL DECISION

Now at this time arguments having been had heretofore and on the 1st day of May, 1952, and decision reserved in Cause No. A-7644, entitled Victor Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants,

Whereupon the Court now rules that bondsmen will be required to appear in Court at 1:30 o'clock p.m. of Wednesday, May 28, 1952, to be examined in respect to their financial qualifications.

Entered May 23, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION TO MAKE MORE
DEFINITE AND CERTAIN, OR IN LIEU
THEREOF, A DEMAND FOR BILL OF
PARTICULARS

Now at this time hearing on motion to make more definite and certain, or in lieu thereof, a demand for bill of particulars in Cause No. A-7644, entitled Victor Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, Jack Akers and Sherman Johnstone, Defendants, came on regularly before the Court, Edward L. Arnell, appearing for and in behalf of the plaintiff, and Bailey E. Bell, appearing for and in behalf of the defendants.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendants.

Argument to the Court was had by Edward L. Arnell, for and in behalf of the plaintiff.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendants.

Whereupon the Court denied motion and defendants given 20 days within which to answer.

Entered May 23, 1952.

[Title of District Court and Cause.]

HEARING ON JUSTIFICATION
OF BONDSMEN

Now at this time Hearing on Justification of Bondsmen in Cause No. A-7644, entitled Victor Gothberg, an individual d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, came on regularly before the Court. Edward L. Arnell appearing for and in behalf of the Plaintiff and Bailey E. Bell appearing for and in behalf of the Defendants.

Keith Young, being first duly sworn, testifies for and in behalf of the defendants.

Leslie Larson, being first duly sworn, testifies for and in behalf of the defendants.

Whereupon the Court finds sureties qualified and motion for more and better bond denied.

Entered May 28, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now Marie Carr, and for answer to the plaintiff's Complaint filed herein, admits, denies and alleges as follows, to-wit:

I.

Answering defendant denies the allegations set forth in plaintiff's first cause of action, and the whole thereof.

II.

That she denies the allegations of plaintiff's second cause of action, and the whole thereof.

III.

That she denies the allegations of plaintiff's third cause of action, and the whole thereof.

IV.

She denies that she is indebted to the plaintiff in any sum whatsoever and asks that she be dismissed, and that she be allowed her costs herein, including a reasonable sum as attorney's fees for defending in this action.

Wherefore, defendant prays judgment of this Court as follows, to-wit:

1. That the plaintiff have and recover no judgment whatsoever against this defendant and that his complaint be fully and completely dismissed as against her.

2. That she recover her costs herein expended, including a reasonable sum as attorney's fees for defending this action, and for such other and further relief as the Court deems just and equitable in the premises.

BELL & SANDERS,

/s/ By BAILEY E. BELL,

Of Attorneys for Defendant
Marie Carr.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed June 7, 1952.

[Title of District Court and Cause.]

M. O. SETTING CAUSE FOR TRIAL

Now at this time upon motion of Edward L. Arnell, of counsel for the plaintiff,

It Is Ordered that Cause No. A-7644, entitled Victor Gothberg, an individual doing business as Gothberg Construction Company, plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, defendants, be, and it is hereby, set for trial to follow trial of Cause A-6581, entitled Alaskan Plumbing & Heating, Inc., versus James Aylen, versus Ron C. Malcolm, defendants, set for trial August 20, 1952.

Entered July 25, 1952.

[Title of District Court and Cause.]

M.O. DISMISSING CAUSE AS TO DEFENDANTS AKERS AND JOHNSTONE

Now at this time upon motion of Edward L. Arnell, of counsel for plaintiff,

It Is Ordered that cause be and it is hereby, dismissed as to the defendants Akers and Johnstone, in Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife and Jack Akers and Sherman Johnstone, Defendants.

Entered September 22, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY

Now on this 22nd day of September, 1952, came the plaintiff, Victor Gothberg and with Edward L. Arnell and William Plummer, of his counsel, came the defendant Burton Carr and with Bailey E. Bell, of his counsel, and both sides announcing themselves as ready for trial in Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Defendants, the following proceedings were had, to-wit:

The Deputy Clerk, under the direction of the Court, proceeded to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors so drawn.

At 11:00 o'clock a.m. Court duly admonished the Jurors in the Box and continued cause to 11:10 o'clock a.m.

Now came the Jurors in the Box, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Defendants, was resumed.

Whereupon, the Deputy Clerk, under the direc-

tion of the Court, continued to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors so drawn, until both sides were satisfied and the Jury complete, consisting of the following named persons, to-wit: 1. Ellen Curtiss; 2. Lois Wise; 3. Nevin H. Boward; 4. R. E. Taylor; 5. Jerry Roys; 6. Roy H. Smith; 7. Muriel Lohnes; 8. Dorothy Jacobs; 9. Florence Hoffman; 10. Nettie A. White; 11. George Kurtz; 12. Irene Robinson.

Upon stipulation of respective counsel two alternate Jurors were drawn, to-wit: 1. Rachel Linder; 2. Leonard M. Johnson; which said Jury was duly sworn by the Deputy Clerk to well and truly try the matters at issue in the above-entitled cause and a true verdict render in accordance with the evidence and the instructions given by the Court.

At this time the Court excused the members of the regular panel of Petit Jurors, not engaged in the trial of this cause, to report at 10:00 o'clock a.m. of Thursday, September 25, 1952.

At 11:50 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Defendants, was resumed.

Opening statement to the Jury was had by Edward L. Arnell, for and in behalf of the plaintiff.

Opening statement to the Jury was had by Bailey E. Bell, for and in behalf of the defendants.

At this time Bailey E. Bell, for and in behalf of the defendant Marie Carr, moves Court cause be dismissed as to defendant Marie Carr; Edward L. Arnell, for and in behalf of the plaintiff, objecting thereto.

Motion denied.

Copy of a proposal for revising Nash Garage Foundation, 5/24/50, signed by Victor F. Gothberg, unsigned by Burton E. Carr, was duly offered, marked and admitted as Plaintiff's Exhibit 1.

A contract, 9/19/50, by and between Victor Gothberg and Burton E. Carr and signed by both parties was duly offered, marked and admitted as Plaintiff's Exhibit 2.

Victor F. Gothberg, being first duly sworn, testified for and in own behalf.

A foundation plan numbered BCG-1 was duly offered, marked and admitted as Plaintiff's Exhibit 3.

At 3:10 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:20 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E.

Carr, Jane Doe Carr, his wife, Defendants, was resumed.

Victor Gothberg, heretofore sworn, resumed stand for further testimony for and in own behalf.

Nine sheets of plans for subject construction was duly offered, marked and admitted as Plaintiff's Exhibit 4-A through 4-I.

Copy of a statement sent to Mr. Burton E. Carr by Gothberg Construction Co., dated 2/23/51 was duly offered, marked and admitted as Plaintiff's Exhibit 5.

Plans and specifications for subject building was duly offered, marked and admitted as Plaintiff's Exhibit 6.

At 4:30 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Tuesday, September 23, 1952.

Now came the Trial Jury, who on being called each answered to his or her name, except for Juror R. E. Taylor who failed to report and he was excused from service on the Trial Jury and his place was taken by first Alternate, Leonard M. Johnson, came the respective parties, came also the respective counsel as heretofore, and the Trial of Cause No. A-7644 entitled Victor Gothberg, individual /d/b/a Gothberg Construction Company, plaintiff versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

Victor F. Gothberg, heretofore sworn resumed stand for further testimony for and in his own behalf.

A letter dated, 12/28/50, to Victor F. Gothberg

signed by Lorn E. Anderson, was duly offered, marked and admitted as Plaintiff's Exhibit 7.

A statement to Mr. Burton E. Carr was duly offered, marked and admitted as Plaintiff's Exhibit 8.

A statement to Mr. Burton E. Carr was duly offered, marked and admitted as Plaintiff's Exhibit 9.

Five statements Re. Subject Construction, was duly offered, marked and admitted as Plaintiff's Exhibit 10.

A statement, dated 1/14/52, to Mr. Burton E. Carr was duly offered, marked and admitted as Plaintiff's Exhibit 11.

At 11:00 o'clock a.m. Court duly admonished the Trial Jury and continued Cause to 11:10 o'clock a.m.

At 11:00 o'clock a.m. Court declared recess to 11:10 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644 entitled Victor Gothberg, individual /d/b/a, Gothberg Construction Company, plaintiff, versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

Victor F. Gothberg, heretofore sworn, resumed stand for cross examination for and in behalf of the defendants.

A plan, BCG-5, was duly offered, marked and admitted as Defendants' Exhibit "A."

A statement, dated 10/20/50, to Mr. Burton E.

Carr was duly offered, marked and admitted as Defendants' Exhibit "B."

At 12:00 o'clock Noon Court duly admonished the Trial Jury and continued Cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644 entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants was resumed.

Victor F. Gothberg, heretofore sworn, resumed stand for further cross examination for and in behalf of the defendants.

A plan, BCG-8 was duly offered, marked and admitted as Defendants' Exhibit "C."

A notice of demand to meet the terms of contract, dated 5/6/52, signed by Burton E. and Marie Carr was duly offered, marked and admitted as Defendants' Exhibit "D."

At 3:00 o'clock p.m. Court duly admonished the Trial Jury and continued Cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644 entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Victor F. Gothberg, heretofore sworn, resumed stand for further cross examination for and in behalf of the defendants.

Edward L. Arnell for and in behalf of the plaintiff moved the Court for leave to amend complaint to conform to the proof; Bailey E. Bell for and in behalf of the defendants objecting thereto; Motion granted.

Now at this time Bailey E. Bell for and in behalf of the defendants moved Court for dismissal of action as to the Defendant, Marie Carr; Edward L. Arnell for and in behalf of the plaintiff objected thereto; decision reserved.

Now at this time Bailey E. Bell, for in behalf of the defendants, moved the Court for dismissal of action as to defendant, Burton E. Carr; motion denied.

Burton E. Carr, first duly sworn, testified for and in behalf of the defendants.

At 4:00 o'clock p.m. Court duly admonished the Trial Jury and continued Cause to 4:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644 entitled Victor Gothberg, individual, /d/b/a Gotherg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants; a check, in the sum of \$175.98, dated

3/16/51, payable to Anchorage Installation signed by Mrs. Burton E. Carr, was duly offered, marked and admitted as Defendants' Exhibit "E."

A check, dated..... in the sum of \$11,535.00 payable to Victor Gothberg Construction Company signed by Mrs. Burton E. Carr with statement attached was duly offered, marked and admitted as Defendants' Exhibit "F."

A check dated 1/13/51, in the sum of \$12,756.07 payable to Victor Gothberg Construction Company, signed by Burton E. Carr, with statement attached, was duly offered, marked and admitted as Defendants' Exhibit "G."

At 4:35 o'clock p.m. Court duly admonished the Trial Jury and continued the cause to 10:00 o'clock a.m. Wednesday, September 24, 1952.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants.

A check, dated 2/25/51, sum of \$10,381.50, payable to Victor Gothberg Construction Co., signed by Burton E. Carr, with statement attached, was duly offered, marked and admitted as Defendants' Exhibit "H."

A check, dated 2/24/51, sum of \$285.92, payable to Anchorage Installation signed by Mrs. Burton E. Carr was duly offered, marked and admitted as Defendants' Exhibit "I" for identification.

At 11:00 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 11:10 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants.

Defendants' Exhibit "I" for identification, with three statements to Commercial Automotive Company by Anchorage Installation Company attached were duly offered, marked and admitted as Defendants' Exhibit "I."

At 12 noon Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E.

Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Archie M. Cupples, being first duly sworn, testified for and in behalf of the defendants.

Kenneth W. Luse, being first duly sworn, testified for and in behalf of the plaintiff.

At 3:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants.

A picture of a Rotary Mechanic's lift was duly offered, marked and admitted as Defendants' Exhibit "J."

At 4:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

A check, dated 11/8/50, sum of \$2,725.71 payable to Alaska Engineering Supply signed by Mrs. Burton E. Carr was duly offered, marked and admitted as Defendants' Exhibit "K."

At 4:45 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 9:30 o'clock a.m. of Thursday, September 25, 1952.

Entered September 22-23-24, 1952.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff above named, pursuant to leave of Court heretofore granted upon motion duly made, and complains and alleges as follows:

First Cause of Action

I.

That the plaintiff is an individual engaged in a general construction and contracting business doing business under the firm name and style of the Gothberg Construction Company.

II.

That on or about the 25th day of May, 1950, the plaintiff and the defendant, Burton E. Carr, on behalf of the defendants, entered into a written contract whereby the plaintiff agreed to do and

perform certain construction work in the erection of a foundation upon Lot One (1), Block Twenty (20) of the East Addition to the original townsite of Anchorage, Alaska; that the agreed value of the work to be performed by the plaintiff was in the sum of \$2542.00.

III.

That thereafter the plaintiff fully performed the obligations of his contract with the defendants and completed said foundation, according to the original plans and specifications; that by reason thereof the defendants are indebted to the plaintiff in the sum of \$2542.00; that the whole of said sum is now due and owing, notwithstanding plaintiff's demands upon the defendants for payment thereof.

Second Cause of Action

And for a second cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That the plaintiff, at the special instance and request of the defendants, rendered and performed certain services in addition to those required by the contract alleged in plaintiff's first cause of action; that the labor and materials so furnished constituted extras in addition to the sum specified in said contract; that the agreed and reasonable value

of such additional work performed by the plaintiff was in the sum of \$1,459.84.

III.

That plaintiff has made demand upon the defendants for the payment of said sum but the whole thereof is now due and owing from the defendants to the plaintiff.

Third Cause of Action

And for a third cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That on or about the 19th day of September, 1950, the plaintiff entered into a written contract with Burton E. Carr for the construction of a building, located upon Lot One (1), Block Twenty (20) of the East Addition, said lot then being owned by the defendants; that by the terms and provisions of said contract, and the plans and specifications, the agreed price to be paid by the defendants to the plaintiff was in the sum of \$38,450.00.

III.

That thereafter, under the terms and provisions of said contract, specifications and plans, and in compliance therewith, the plaintiff substantially performed said contract and is entitled to final payment thereon in the amount of \$3845.00; that the

plaintiff has received partial payment upon said contract and there now remains due and owing to the plaintiff from the defendants the sum of \$3845.00.

IV.

That plaintiff has made demand upon the defendants for the payment of said remaining balance but the whole thereof is now due and owing from the defendants to the plaintiff.

Fourth Cause of Action

And for a fourth cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants the plaintiff performed interior finish work upon the building now located upon Lot One, Block Twenty of the East Addition to the original townsite of Anchorage, Alaska; that pursuant to the provisions of an oral contract entered into between the parties for such work the agreed and the reasonable value of the work performed by the plaintiff is in the sum of \$5,351.74.

III.

That plaintiff has made demand upon the defendants for the payment of said sum but the whole thereof is now due and owing from the defendants to the plaintiff.

Fifth Cause of Action

And for a fifth cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants, the plaintiff performed additional work in accordance with a change order according to specification paragraph CC-15 of the written contract, entered into between the parties, the agreed and reasonable value of which is in the sum of \$3,925.00.

III.

That the plaintiff has made demand upon the defendants for the payment of said sum; that the defendants have failed and refused to pay said sum or any part thereof, and now the whole of said indebtedness is owing from the defendants to the plaintiff.

Wherefore, the plaintiff prays judgment against the plaintiffs and each of them as follows:

1. For the sum of \$17,174.16, together with interest thereon at the date of six per cent (6%) per annum from the 1st day of March, 1951.

2. For the costs and disbursements of this action, including attorneys' fees, incurred by the plaintiff.

3. For such other and further relief as the Court may deem proper in the premises.

PLUMMER & ARNELL,
/s/ By E. L. ARNELL,
Attorneys for Plaintiff.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 25, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further cross examination for and in behalf of the Plaintiff.

An order for extra work, dated 2/20/51, to Anchorage Installation Company signed by B. E. Carr was duly offered, marked and admitted as Plaintiff's Exhibit 12.

An order for extra work, dated 1/2/51, to Anchorage Installation Company, signed by Burton E.

Carr was duly offered, marked and admitted as Plaintiff's Exhibit 13.

At 11:05 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 11:15 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

At 12:00 o'clock Noon Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn resumed stand for further cross examination for and in behalf of the Plaintiff.

At 3:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called,

each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in his own behalf.

A check dated 2/26/51, in the sum of \$2,725.40 payable to Husky Construction Company, signed by Mrs. Burton E. Carr was duly offered, marked and admitted as Defendants' Exhibit "L."

A statement, dated 8/16/51, in the sum of \$18.00 to Nash Garage by Alaska Neon Engineering Company, was duly offered, marked and admitted as Defendants' Exhibit "M."

A freight bill, dated 12/4/50, by Alaska Railroad to Burton E. Carr, was duly offered, marked and admitted as Plaintiff's Exhibit 14.

A freight bill, dated 12/15/50, by Alaska Railroad to Burton E. Carr, was duly offered, marked and admitted as Plaintiff's Exhibit 15.

At 4:20 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Monday, September 29, 1952.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E.

Carr, and Jane Doe Carr, his wife, Defendants, was resumed.

At this time upon the Court's own motion trial continued to 2:00 o'clock p.m. this date.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in own behalf.

An itemized statement, dated 2/21/51 to Nash Garage by Husky Construction Co., was duly offered, marked and admitted as Defendants' Exhibit "N" for identification.

Court directs that order admitting in evidence Defendants' Exhibit "L" be set aside and exhibit withdrawn.

A check, dated 5/9/51, sum of \$73.85, payable to City Electric, signed by Mrs. Burton E. Carr with statements to Commercial Automotive Service by City Electric was duly offered, marked and admitted as Defendants' Exhibit "O."

A check, dated 4/16/51, sum of \$27.25, payable to Anchorage Installation signed by Mrs. Burton E. Carr, was duly offered, marked and admitted as Defendants' Exhibit "P."

At 3:05 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:15 o'clock p.m.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr, and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in own behalf.

A check, dated 3/15/51, sum of \$17.25, payable to Anchorage Sand & Gravel signed by Mrs. Burton E. Carr, with statements by Anchorage Sand & Gravel to "Bert Carr" attached were duly offered, marked and admitted as Defendants' Exhibit "Q."

A check, dated 6/12/51, sum of \$118.40 payable to Ketchikan Spruce Mills signed by Mrs. Burton E. Carr, with two statements by Ketchikan Spruce Mills to Commercial Auto Service was duly offered, marked and admitted as Defendants' Exhibit "R."

At 3:55 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:05 o'clock p.m.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr, and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

Charles E. Wyke, being first duly sworn, testified for and in behalf of the defendants.

At 4:40 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m. of Tuesday, September 30, 1952.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Charles E. Wyke, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

At 3:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, being first duly sworn, testified for and in behalf of the defendants.

At 4:07 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:17 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respec-

tive parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants.

At 5:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Wednesday, October 1, 1952.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

At 10:30 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 10:40 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. 7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, versus Bur-

ton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

At 11:52 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. 7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, heretofore sworn, resumed stand for testimony for and in behalf of the plaintiff.

At 2:35 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:50 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. 7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Roy Farrar, first duly sworn, testified for and in behalf of the defendants.

Defendants rest.

Edward L. Arnell, for and in behalf of the plaintiff, moved Court for dismissal of defendants' cross-complaint on grounds the evidence is insufficient to establish the allegations of the cross-complaint. Motion denied.

Maynard L. Taylor, Jr., first duly sworn, testified for and in behalf of the Plaintiff.

Loren E. Anderson, first duly sworn, testified for and in behalf of the Plaintiff.

At 3:45 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:05 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. 7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Loren E. Anderson, heretofore sworn, resumed stand for further testimony for and in behalf of the plaintiff.

At 4:35 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m., Thursday, October 2, 1952.

Entered: Sept. 25-29-30-Oct. 1, 1952.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the above named defendant, Burton E. Carr, and for answer to the Amended Complaint adopts all of the allegations in his answer to the original Complaint and makes the same a part hereof, and in addition thereto alleges and states:

First Cause of Action

I.

He admits the allegations of paragraph I of the First Cause of Action set forth in the Amended Complaint.

II.

Defendant admits the allegations of paragraph II of the First Cause of Action set forth in the Amended Complaint.

III.

Defendant denies all of the allegations set forth in paragraph III of the Amended Complaint, except such as are admitted in his Cross-Complaint filed herein, which Cross - Complaint is hereby adopted and made a part of this answer as fully as if set out herein in full.

Second Cause of Action

Defendant denies the allegations set forth in the Second Cause of Action and the whole thereof, save and except he admits that he did request the plaintiff to construct two walls in the Southwest corner of the building to make a boiler room, but alleges the construction was so defective and faulty

that the boiler room later, when finished by the plaintiff under another contract, did not drain and there is a large bulge in one of the walls and the work was so performed under the terms of the first contract referred to in the First Cause of Action is so defective that the defendant owes the plaintiff nothing for extras as set forth in the Second Cause of Action.

Third Cause of Action

This defendant denies each, all, and every allegation set forth in the plaintiff's Third Cause of Action, save and except those specifically admitted in this answer and the original answer filed and in the Cross-Complaint, and in addition thereto alleges:

I.

That he did enter into a contract with the plaintiff on the 19th of September, 1950 for the construction of a building and did agree to pay therefor when finished \$38,450.00, but he specifically alleges that the plaintiff never did finish said building and left the same in an unfinished condition, and that any suit brought to recover on this contract is prematurely filed because the contract has never been complied with on the part of the plaintiff, and that he can not maintain an action for the contract price at this time and he is therefore not indebted to the plaintiff in any sum whatsoever, on the Third Cause of Action.

Fourth Cause of Action

This defendant specifically denies each, all, and

every allegation contained in the Fourth Cause of Action and in addition thereto alleges that the plaintiff did do some extra work in the building and that the reasonable value of such extra work so done would not exceed the sum of \$2,500.00 but that he does not owe the plaintiff anything for said work for the reason that he has now overpaid him for all work done and all material furnished by having previously paid him a sum in excess of \$34,672.57 in cash, and paid bills that were the just obligations of the plaintiff in the sum of several thousand dollars, and has more than paid the plaintiff any and all sums that were ever due him for any work or labor performed or material furnished, and is therefor not indebted to the plaintiff in any sum on the Fourth Cause of Action.

Fifth Cause of Action

Defendant denies all of the allegations of the Fifth Cause of Action and the whole thereof and adopts all of the allegations of his answer to the Fourth Cause of Action and makes the same a part hereof, and denies that he is indebted to the plaintiff in any sum whatsoever.

Wherefore, defendant prays that the plaintiff take nothing on his First, Second, Third, Fourth and Fifth Causes of Action and that this defendant recover on his Cross-Complaint the sum of \$20,000.00, as set forth therein, which Cross-Complaint is hereby made a part of this Answer as fully as if set out and re-alleged herein in full, and for such other and further relief as the Court deems just

and equitable in the premises, and for all costs of this action.

BELL & SANDERS

/s/ By BAILEY E. BELL,

Attorneys for Defendants.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 2, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, except Juror, Ellen Curtiss who has reported illness in her immediate family and is excused from further service in this cause and Second Alternate Linder takes her place as a regular member of the Trial Jury, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. A-7644, entitled, Victor Gothberg, individual, d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Keith F. Young, first duly sworn, testified for and in behalf of the plaintiff.

At 11:01 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 11:12 o'clock a.m.

Now came the Trial Jury, who on being called,

each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. A-7644, entitled Victor Gothberg, individual, d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Keith F. Young, heretofore sworn, resumed stand for testimony for and in behalf of the Jurors.

Harry M. McKee, first duly sworn, testified for and in behalf of the defendants.

Loren E. Anderson heretofore sworn, resumed stand for further testimony for and in behalf of the plaintiff.

Harry M. McKee, heretofore sworn, resumed stand for further testimony for and in behalf of the plaintiff.

Copy of an excerpt from the uniform Building Code, City of Anchorage, Titled Sec. 2805 (a) Footings and Foundations was duly offered, marked and admitted as defendants' Exhibit "S".

At 12:00 o'clock Noon Court duly admonished the Trial Jury and continued cause to 1:30 o'clock p.m.

Now at this time came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton C. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Harry M. McKee, heretofore sworn, resumed

stand for further testimony for and in behalf of the plaintiff.

A copy of an application to City of Anchorage for a building permit by Burton C. Carr was duly offered, marked and admitted as plaintiffs Exhibit 16.

Loren E. Anderson, heretofore duly sworn, resumed stand for further cross-examination for and in behalf of the defendants.

At 2:42 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:52 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7644, entitled Victor Gothberg, an individual, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Victor F. Gothberg, heretofore sworn, resumed stand for further testimony for and in own behalf.

The Plaintiff rests.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in own behalf.

The structural steel plan for subject building by Pacific Car and Foundry Company was duly offered, marked and admitted as defendant's Exhibit "T".

A City of Anchorage building permit No. 4751 dated 4/23/51 issued to Burton Carr was duly offered, marked and admitted as defendants' Exhibit "U".

Defendants rest.

Victor F. Gothberg, heretofore sworn, resumed stand for further testimony for and in own behalf.

An analysis of plans, specifications and contract documents and appraisal of subject building was duly offered, marked and admitted as defendants' Exhibit "V" for identification.

At 3:50 o'clock p.m. Trial Jury is admonished and sent to inspect the subject premises in charge of the bailiff; and cause continued until return of the Trial Jury.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

At 4:57 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m. of Monday, October 6, 1952.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, plaintiff, versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

At this time on motion of Bailey E. Bell, of counsel for the defendants, defendants' case-in-chief

is re-opened for the purpose of the taking of further testimony of defendant, Burton E. Carr.

Burton E. Carr, heretofore duly sworn, resumed stand for further testimony, for and in behalf of the defendants.

Opening argument to the Jury was had by Edward L. Arnell, for and in behalf of the plaintiff.

At 2:48 o'clock p.m., Court duly admonished the Trial Jury and continued cause to 2:58 o'clock p.m.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, plaintiff versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

Argument to the Jury was had by William H. Sanders for and in behalf of the defendants.

Argument to the Jury was had by Bailey E. Bell for and in behalf of the defendants.

At 4:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:10 o'clock p.m.

Entered Oct. 2, 6, 1952.

[Title of District Court and Cause.]

DEFENDANT'S OFFERED INSTRUCTION
No. ONE

You are instructed that the Plaintiff has failed to make out a cause of action against the Defendant,

Burton E. Carr, in favor of the Plaintiff, on his First Cause of Action; and

On his Second Cause of Action; and,

On his Third Cause of Action; and,

On his Fourth Cause of Action; and,

On his Fifth Cause of Action; and,

You are instructed to find in favor of the Defendant Burton E. Carr, and against the Plaintiff on said causes of action.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 6, 1952.

[Title of District Court and Cause.]

**DEFENDANT'S REQUESTED INSTRUCTION
No. TWO, TO BE GIVEN IN LIEU OF IN-
STRUCTION No. THREE AS PREPARED
BY THE COURT**

In considering the contract between the parties for the construction of the building, you are charged that the plans and specifications admitted in evidence are a part of that contract, and each of the parties is bound to a faithful fulfillment of the provisions thereof.

By stating that each of the parties is bound to a faithful fulfillment of the provisions of the contract is meant that the Plaintiff must have fulfilled the contract as set forth in the plans and specifications and the terms of said contract.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 6, 1952.

[Title of District Court and Cause.]

DEFENDANT'S OFFERED INSTRUCTION
No. FOUR

Plaintiff, to recover in this action, must prove by a preponderance of the evidence that he has performed all the terms and conditions of the contract between the Plaintiff and the Defendant.

If you find that he has not performed all the terms and conditions of the contract, which the Plaintiff has admitted in his evidence, then the Plaintiff is not entitled to recover unless he has shown substantial performance of the contract. To show substantial performance of the contract the Plaintiff must show by a preponderance of the evidence that any deviation or omission or failure to

perform in accordance with the contract, was a trivial imperfection in small detail and did not constitute a deviation from the general plan as contemplated by the contract. And you are further instructed that any omission to comply with the terms of the contract due to carelessness on his behalf, or an intentional or willful failure on the part of the Plaintiff to comply with the terms of the contract, does not constitute substantial performance. Therefore, unless you find that the Plaintiff faithfully fulfilled the terms of the contract, or that he substantially performed all of the work called for by the contract, and that any deviation or omission of any terms of the contract was not caused by carelessness or an intentional or willful act on the behalf of the Plaintiff, you must render judgment for the Defendant, *Burton E. Carr*.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 6, 1952.

[Title of District Court and Cause.]

DEFENDANT'S OFFERED INSTRUCTION No.
THREE, OFFERED ONLY IF THE COURT
REFUSES TO GIVE DEFENDANT'S IN-
STRUCTION No. TWO AND ALLOWS THE
DEFENDANT EXCEPTION THERETO.

In considering the contract between the parties for the construction of the building, you are charged that the plans and specifications admitted in evidence are a part of that contract, and each of the parties is bound to a faithful fulfillment of the provisions thereof.

By stating that each of the parties is bound to a faithful fulfillment of the provisions of the contract is meant that the Plaintiff must have fulfilled the contract as set forth in the plans and specifications and the terms of said contract, or, there must have been a substantial compliance with the provisions of said contract. By a substantial compliance with all of the provisions of said contract, you are instructed that, substantial compliance means: That, there is a substantial performance of such a contract where all the essentials necessary to the full accomplishment of the purpose for which the thing contracted for has been constructed or performed with such an approximation to complete performance, that the owner obtains substantially what he called for by the contract. It is essential to its application that the contractor must have acted in good faith and has unintentionally failed.

The rule cannot be invoked where the failure to perform is willful, intentional, or due to carelessness, and if the contractor, the Plaintiff herein, has failed in any way to perform the contract and has failed to act in good faith therein, or that he failed to perform intentionally or was careless in failing to perform, then he cannot recover anything in this action, and your judgment must be for the Defendant.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,

District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 6, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, plaintiff versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

Closing argument to the Court was had by Edward L. Arnell, for and in behalf of the plaintiff.

Whereupon the Court reads its instructions to the Trial Jury, and R. E. Manchester and B. L. Willis were duly sworn by the Deputy Clerk as bailiffs in charge of said Jurors and at 5:20 o'clock p.m., the Trial Jury retired in charge of their sworn bailiffs, for deliberation with instructions for a sealed verdict.

Entered Oct. 6, 1952.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and

your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

1.

This is an action brought by the plaintiff, Victor Gothberg, an individual doing business as the Gothberg Construction Company, against the defendant, Burton E. Carr, his wife, Marie Carr, Jack Akers and Sherman Johnstone. By order of the Court heretofore made, the action has been dismissed as to the defendants Marie Carr, Jack Akers and Sherman Johnstone, and as a consequence thereof, Burton E. Carr is now the sole defendant in the action.

The plaintiff asserts that this action is based upon two written contracts and three alleged oral contracts for the construction of a building, the building itself and additional finish work and other work pursuant to changes in the original plans whereby the plaintiff asserts that there became due and owing to him from the defendant a total sum of \$51,779.16, upon which the defendant has paid the sum of \$34,605.00, leaving a balance due, owing and unpaid from the defendant to the plaintiff in the amount of \$17,174.16.

The plaintiff asserts that the first contract between plaintiff and defendant related to the construction of a foundation for the building afterwards erected thereon; that the foundation had

been built by others but by reason of some City ordinance it was required that the foundation of the building to be constructed be moved further to the rear of the lot and that as a consequence, it was necessary to move the front part of the foundation to the rear, a distance of about 12 feet, and to build a new rear foundation approximately 12 feet further toward the back end of the lot than was the foundation originally built; that although a written contract was entered into between the parties to do foundation work for the compensation of \$2,542.00, such changes were made by oral agreement as to result in a final price of \$4,051.84, which is claimed by the plaintiff for that part of the work. This last figure is in error by \$50.00 and should be \$4,001.84.

After beginning the trial of this action the plaintiff filed herein an amended complaint embracing five separate causes of action covering the different features of the contracts and agreements between the plaintiff and defendant. In the first two causes of action contained in the amended complaint, the plaintiff refers to the contract of May 25, 1950, for construction work on the foundation at the agreed value of \$2,542.00 and asserts, in his second cause of action, that at the instance and requests of defendant, the plaintiff performed additional work thereon of the value of \$1,459.84, thus making the total of \$4,001.84 hereinbefore referred to.

It further appears from the plaintiffs amended complaint and from the evidence that a written contract was made between plaintiff and defendant

for the construction of a building on the foundation above mentioned at an agreed cost of \$38,450.00 with provision for possible additional work; that after the signing of the contract, which embraced by reference plans and specifications, the plaintiff performed additional work on the building partly in the nature of finishing work and partly by reason of changes agreed upon by the parties, so that eventually, the total charge of the plaintiff to defendant for all of such work amounted to \$47,722.32. This sum added to the plaintiff's charge against the defendant for the foundation work brings the total claimed by plaintiff, as shown above, to \$51,779.61, on which has been admittedly paid the sum of \$34,605.00, leaving a balance due and owing from defendant to plaintiff, as asserted by plaintiff, in the amount of \$17,174.16.

The defendant, in his answer and cross complaint and in his answer to the amended complaint, which by reference also embodies the cross complaint, asserts that the only contract between plaintiff and defendant with respect to the foundation was a written contract calling for payment of \$2,542.00, that all this has been paid and hence there is nothing due from the defendant to the plaintiff upon the plaintiff's claim for compensation having to do with the foundation of the building. With respect to this subject, you will recall that the defendant has stated that a part of the work done in the basement boiler room is to be considered as extra work and not included in the construction price of the building of \$38,450.00 provided in the contract,

but the defendant further stated that such extra work was not worth more than \$250.00.

The defendant in his answer and cross complaint and his answer to the plaintiff's amended complaint, alleges that he has paid to the plaintiff on the contract for the construction of the building several sums amounting in all to \$34,672.57; and that the defendant further paid out various sums to do work on the building and furnish material therefor which was required to be done by the plaintiff under the contract. The defendant further avers in the cross complaint and in his testimony in support thereof, that the plaintiff failed and refused to perform many items of work and labor and failed to supply certain materials which, the defendant asserts, plaintiff was bound to perform, supply and furnish under the terms of the contracts; that the plaintiff failed to do much of the work on the building in a good and workmanlike manner; and that as a result of all of these violations of contract on the part of plaintiff, the defendant has been damaged in the sum of \$20,000.00.

The plaintiff denies the affirmative averments of defendant's cross complaint and amended answer.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in this action consisting of the plaintiff's amended complaint and the answer and cross complaint filed by and on behalf of the defendant and his answer to the amended complaint, so that you may, if you wish, read these pleadings and thus perhaps gain

a clearer concept of the various claims and contentions of the parties, one against the other.

However, you should remember that pleadings are in no sense evidence. You should not consider any pleading as evidence that the pleader is entitled to what he claims. The pleadings merely serve the purpose of setting forth the claims and contentions of the parties and if any assertion or feature of any pleading is not supported by sufficient evidence, it should be disregarded entirely. Your decision in this case must be based as to the facts upon the testimony given in open court and the other evidence presented to you in open court, and also, as to the law only, upon instructions of the Court. You have been permitted during the trial to view the premises in dispute, and accordingly you may also consider the knowledge you have gained by such inspection, but in considering that knowledge, you must remember that a considerable period of time has elapsed, approximately 1½ years, since the building went into the possession of the defendant, and hence, allowance must be made for natural changes which would take place during that period even if all of the work contemplated by the contracts between the parties was done in good and workmanlike fashion.

2.

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is

meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

Under the rule above stated, the burden is upon the plaintiff to prove the material averments of his amended complaint by a preponderance of the evidence. Similarly, the burden is upon the defendant to prove the material averments of his cross complaint by a preponderance of the evidence.

3.

In considering the contract between the parties for the construction of the building, you are charged that the plans and specifications admitted in evidence are a part of that contract and each of the parties is bound to a faithful fulfillment of the provisions thereof.

There is nothing in the law to forbid the parties to such a contract to modify the terms thereof including the plans and specifications by oral agree-

ment and if you should find from the evidence that any term or provision or item of the contract, including the plans and specifications, was, after the signing of the contract, changed or modified by oral agreement of the parties, then you must give effect to such changes or modifications in the verdict which you will render in this case.

By stating that each of the parties is bound to a faithful fulfillment of the provisions of the contract, it is meant that there must be a substantial, rather than literal, compliance with the provisions of such contract. "Substantial compliance", with reference to contracts, means, that although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, he has received essentially the benefit he expected.

3-A

With further reference to substantial performance of the contracts, there is a substantial performance where the variance from the specifications of the contracts is relatively trivial and unimportant and is one by which the building and structure as a whole is not impaired and where the building and structure is actually used after it is erected for its intended purpose and where the defects can be remedied by the owner without any great expenditure and without material damage to other parts of the property and may without injustice be compensated for by deductions from the contract price. On the other hand, to constitute substantial performance,

a general adherence to the plans prescribed is not sufficient and the contract is not substantially performed if the builder willfully, carelessly or in bad faith fails in his duty of performance or leaves his work incomplete in any substantial and material respect or makes deviations and omissions without the consent of the owner that affect a large saving to himself and a consequent damage to the owner, or which are so substantial as not to be capable of remedy and an allowance out of the contract price will not give the owner essentially what he contracted for.

3-B

If you find under the law as stated in these instructions that the plaintiff failed to perform substantially any of the several contracts, whether written or oral, here sued upon by plaintiff in his five separate causes of action as stated in his amended complaint, and did not substantially perform and carry out such contract, the plaintiff is not entitled to recover anything whatever on such contract which has not been substantially performed.

4.

In the plaintiff's second, fourth and fifth causes of action, he claims compensation for work done and material furnished not covered by the written contracts between the parties which are dated May 25, 1950 and September 19, 1950, the earlier one concerning the foundation of the building and the latter the construction of the main building itself. The amount claimed in the second cause of action

is \$1,459.84 and in the fourth cause of action \$5,351.74 and in the fifth cause of action \$3,925.00. You should consider the evidence in support of and against the averments contained in these causes of action just the same as you consider the evidence upon the first and third causes of action. If you find that the plaintiff has proved by a preponderance of the evidence the material averments of his amended complaint with respect to any or all of these causes of action, you should give credit to the plaintiff in your verdict accordingly. The claims of the plaintiff based upon alleged oral contracts are to be considered just as carefully as those based upon the written contracts submitted in evidence. If you find that the plaintiff has failed to support any of his claims against the defendant stated in any of his causes of action by a preponderance of the evidence then the plaintiff is not entitled to recover thereon as to the cause or causes of action so failing of support by a preponderance of evidence, and your verdict should be for the defendant thereon, in whole or in part, as the evidence justifies. The plaintiff should be allowed credit for that part or portion of his claim or demand, as respects any of his causes of action, that has been proved by a preponderance of the evidence, but not for any part or portion not so proven. This instruction is subject to the foregoing instructions, especially 3-B with respect to substantial performance of contracts.

5.

It is your duty to determine upon all of the evidence and upon these instructions of the Court as

to the law, whether the defendant is justly indebted to the plaintiff and if so, in what amount, or whether the defendant is entitled to recover from the plaintiff damages and if so, in what sum.

You are charged that if the plaintiff substantially and faithfully performed his contracts made with the defendant you should return a verdict for the amount you find justly due him. Of course, the plaintiff is not entitled to the full amount claimed if he failed to do all of the work or furnish all of the materials which he contracted to do and furnish and you should make adjustments accordingly.

In like manner, you should consider the claims of the defendant as stated in the evidence offered in support of the averments of his answer and cross complaint, and if you find from the evidence that the defendant is entitled to recover from the plaintiff damages arising from the failure of plaintiff to do the work and furnish the materials specified in the contracts, whether written or oral, then such damages should be deducted from any amount which you might find otherwise due to the plaintiff, and if those damages exceed the amount, if any, which you might find would otherwise be due to the plaintiff, a verdict should be rendered in favor of the defendant for the balance. It is your duty, as you know, to do equal justice between the parties to the action and you are the sole judges of all of the facts of the case.

6.

As stated in the complaint, the plaintiff claims that there is due, owing and unpaid to him from

the defendant the sum of \$17,174.16, together with interest thereon at the rate of six per cent per annum from the first day of March, 1951.

If the plaintiff is entitled to recover from the defendant in any sum, he is also entitled to recover interest on that sum from the date when the debt became due at the rate of six per cent per annum, which is the legal rate of interest in the Territory of Alaska as to debts of this nature where no specific rate of interest is set out in the contract or otherwise fixed by law.

If you find that the plaintiff is not entitled to recover any sum whatever from the defendant and that the defendant is entitled to recover any sum from the plaintiff, interest may be allowed in like manner on the amount which you find due from the plaintiff to defendant from the date upon which you find the same became due.

7.

Plaintiff's Exhibit 7 in this case is a letter dated December 28, 1950, addressed to the plaintiff by by Lorn E. Anderson, the engineer who drew the plans and specifications on behalf of the defendant. Defendant has testified that Anderson was recommended to him by the plaintiff. In his testimony, the defendant has denied that Anderson had any authority from the defendant to write the letter dated December 28, 1950.

If you find that Anderson had authority from the defendant to write such a letter and deliver it to the plaintiff, then the defendant is bound thereby to the same extent as though he had written the

letter himself. If you find that Anderson had no authority from the defendant, specific or general, to write such a letter, then the defendant is not bound by the letter. However, if you find that the defendant orally directed the plaintiff to do the work specified in the letter, the defendant would be obliged to carry out such oral agreement irrespective of the letter.

8.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although every jury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact,—unless so intimately related to matters of law that a determination must be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will

attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

9.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence

which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

10.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

11.

During the trial of a case, it may be suggested or argued that the credibility of a witness has been "impeached." To "impeach" means to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to.

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity, or by proof of his bias,

interest or hostility, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the case. However, the impeachment of the credibility of a witness does not necessarily mean that his testimony is completely deprived of value, or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of serious importance. Whenever it is practicable and reasonable, you will attempt to reconcile conflicting or inconsistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

12.

You are not bound to believe something to be a

fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think such facts and circumstances warrant it.

13.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

14.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such.

It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

15.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, on considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

16.

You are to consider these instructions as a whole.

It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

17.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in the case, the exhibits, these instructions and two forms of verdict. You will thereupon elect one of your members foreman who is to speak for you and sign and date the verdict unanimously agreed upon. If you find for the plaintiff and against the defendant you will insert in the verdict which has been prepared for that contingency and which is marked "Verdict No. 1" the sum which you find that the plaintiff is entitled to recover of and from the defendant and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict.

Similarly, if you find that the plaintiff is not entitled to recover any sum whatever against the

defendant, and that the defendant is entitled to recover from the plaintiff, you will insert in the form of verdict which has been prepared for that contingency and which is marked "Verdict No. 2," the amount which you find the defendant is entitled to recover from the plaintiff and your foreman will thereupon date and sign that verdict and you will return the same into Court as your verdict.

If you find that neither party is entitled to recover any sum whatever from the other, then you will still use Verdict No. 2, but will insert the word "no" in the blank space before the word "Dollars" and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict. In this fashion you will find for the defendant and against the plaintiff but will further find that the defendant is not entitled to recover any sum whatever from the plaintiff. Under such a verdict, the defendant is entitled to recover his costs from the plaintiff but that is a matter of law with which you have no direct concern.

With your verdict you will return into Court the pleadings, the exhibits, these instructions and the form of verdict not used by you.

Dated at Anchorage, Alaska, this 6th day of October, 1952.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed October 7, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now at 10:00 o'clock a.m., came the Jury, in charge of their sworn bailiffs, who, on being called, each answered to his or her name, came also the respective parties with their respective counsel, and said Jury did present, by and through their Foreman, in open Court, their verdict in cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, plaintiff, vs. Burton E. Carr and Jane Doe Carr, his wife, defendants, which is in words and figures as follows, to-wit:

[Title of District Court and Cause.]

VERDICT No. 1

We, the jury, duly sworn and impanelled to try the above entitled cause, do find for the plaintiff and against the defendant and do further find that the plaintiff is entitled to recover of and from the defendant the sum of Fourteen Thousand Two Hundred Fifty and 82/100 Dollars (\$14,250.82), together with interest thereon at the rate of six per cent (6%) per annum, from the 1st day of March, '51.

Dated at Anchorage, Alaska, this 7th day of October, 1952.

/s/ NEVIN H. BARNARD,
Foreman.

[Endorsed]: Filed October 7, 1952.

[Title of District Court and Cause.]

VERDICT No. 2

We, the jury, duly sworn and impanelled to try the above entitled cause, do find for the defendant and against the plaintiff and do further find that the defendant is entitled to recover of and from the plaintiff the sum of Eight Thousand One Hundred Thirty-One and 63/100 Dollars (\$8,131.63), together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of March, 1951.

Dated at Anchorage, Alaska, this 7th day of October, 1952.

/s/ NEVIN H. BARNARD,
Foreman.

[Endorsed]: Filed October 7, 1952.

Which verdict the Court ordered filed and discharged the Jury to report at 10:00 o'clock a.m. of Friday, October 10, 1952.

Entered October 7, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Comes now the Defendant, Burton E. Carr, he having heretofore at the close of the testimony and the trial hereof, moved the Court to direct a verdict in his favor to the effect that the Plaintiff could not recover due to the fact that he had not complied with the terms of the contracts involved, either literally or by a substantial performance, which motion was denied, and the case was submitted to the jury, and thereafter, two (2) verdicts were rendered in the case, one (1) in favor of the Plaintiff, and one (1) in favor of the Defendant. That the verdict rendered for the Plaintiff is contrary to law and is not justified by the evidence and was rendered against the Defendant after he had moved for a dismissal of the Plaintiff's causes of action, and had also moved the Court to instruct the jury to return a verdict in favor of the Defendant, on all five of the Plaintiff's purported causes of action, and the Defendant now moves that a Judgment be entered in his favor dismissing the Plaintiff's Five Purported Causes of Action, notwithstanding the verdict, on the following grounds, to-wit:

(a) That the motion to dismiss the Plaintiff's five purported Causes of Action, each separately moved against by the Defendant, should have been sustained by the Court for the reason that the evidence was clear to the effect that the contracts sued on had not been complied with by the Plaintiff,

either literally according to the terms of this contract, or by a substantial performance as defined by law, and, therefore, the Court should have sustained a motion to dismiss or should have sustained Defendant's offered Instructions No. 1, No. 2, No. 3, and No. 4, which were by the Court overruled, and an exception allowed to this Defendant. A copy of the Defendant's Offered Instructions Nos. One through Four are attached hereto and made a part hereof.

(b) For the further grounds that the jury found by its verdict No. Two, that the Plaintiff did not comply with the terms of its contract and rendered a verdict in favor of the Defendant for the breach of the terms of said contract in damages in the sum of Eight Thousand, One Hundred Thirty-One Dollars and Sixty-Three Cents (\$8,131.63), showing conclusively the failure of the Plaintiff to perform the terms of the contract, either literally or substantially, as by law defined.

(c) That the evidence in the case does not sustain the purported verdict No. One, which verdict was in favor of the Plaintiff and against the Defendant, even if the law authorized such verdict.

This Defendant reserves the right, in the event his Motion for Judgment Notwithstanding Verdict, is denied, to apply for a new trial.

Dated at Anchorage, Alaska, this 8th day of October, 1952.

BELL & SANDERS,

/s/ By WILLIAM H. SANDERS,

* * * * *

Attorneys for Defendant.

[Endorsed]: Filed October 8, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT NOT-
WITHSTANDING THE VERDICT AND
NOTICE OF INTENTION TO MOVE FOR
A NEW TRIAL IF FORMER MOTION BE
DENIED

To: Victor Gothberg, an individual doing business
as Gothberg Construction Company, Plaintiff,
and Plummer and Arnell, Attorneys of record
for the Plaintiff:

You and each of you will please take notice that
on Monday, October 13th, 1952, at 10:00 a.m., or
as soon thereafter as counsel can be heard, at the
Court Room of the District Court of the Territory
of Alaska, Third Judicial Division, Anchorage,
Alaska, the above named Defendant, Burton E.
Carr, will call up for hearing and will move the
Court to vacate the verdict No. One in the above
entitled cause, which verdict is in favor of the
Plaintiff and against the Defendant, for the sum
of Fourteen Thousand, Two Hundred Fifty Dollars
and Eighty-Two Cents (\$14,250.82), dated the 7th
day of October, 1952, and returned into Court and
filed in the above entitled cause, and will further
move the Court that a judgment be entered in favor
of the Defendant on each of the Five Purported
Causes of Action set forth and pleaded in the
Plaintiff's Amended Complaint, notwithstanding the
verdict, on the grounds heretofore stated in the
Defendant's Motion made at the close of the testi-

mony at the trial thereof, and for a directed verdict in his favor, after all of the evidence was in and the trial of the case had been closed as to any further testimony, and to render a judgment notwithstanding the verdict in favor of the Defendant on each and all of said Five Purported Causes of Action. And in the event the Defendant's Motion for Judgment Notwithstanding the Verdict be denied, he intends to move the above entitled Court to vacate the said verdict and set aside the same, and to grant a new trial of said cause upon the following grounds materially affecting the substantial rights of said Defendant, to-wit:

(a) That the motion to dismiss the Plaintiff's Five Purported Causes of Action, each separately moved against by the Defendant, should have been sustained by the Court for the reason that the evidence was clear to the effect that the contracts sued on had not been complied with by the Plaintiff, either literally according to the terms of this contract, or by a substantial performance as defined by law, and, therefore, the Court should have sustained a motion to dismiss or should have sustained Defendant's offered Instructions No. 1, No. 2, No. 3, and No. 4, which were by the Court overruled, and an exception allowed to this Defendant.

(b) For the further grounds that the jury found by its verdict No. Two, that the Plaintiff did not comply with the terms of its contract and rendered a verdict in favor of the Defendant for the breach of the terms of said contract in damages in the sum of Eight Thousand, One Hundred Thirty-one

Dollars and Sixty-three Cents (\$8,131.63), showing conclusively the failure of the Plaintiff to perform the terms of the contract, either literally or substantially, as by law defined.

(c) That the evidence in the case does not sustain the purported verdict No. One, which verdict was in favor of the Plaintiff and against the Defendant, even if the law authorized such verdict.

A copy of the Motion filed herein is hereto attached, marked Exhibit A, and made a part of this notice as fully as if reincorporated and set out herein.

Said motion will be presented to the Court, based upon this Notice, together with all the pleadings, papers, records and files in the above entitled action, as well as upon the minutes of the Court and the testimony adduced at the trial, including the Court Reporter's Record of all proceedings had herein.

Dated at Anchorage, Alaska, this 8th day of October, 1952.

BURTON E. CARR,
Defendant,

By BELL & SANDERS
/s/ By WILLIAM H. SANDERS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed October 8, 1952.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICTS OR, IN
THE ALTERNATIVE, FOR A NEW TRIAL

Now, comes the Plaintiff above-named and moves this Court for an order setting aside the verdicts rendered herein and for the entry of a judgment, notwithstanding such verdicts, in favor of the Plaintiff and against the Defendant, or in the alternative, for an order granting a new trial upon all issues in the above-entitled cause for the following reasons:

1. The Court erred in over-ruling Plaintiff's motion to dismiss Defendant's cross-complaint at the conclusion of the Defendant's evidence in support thereof.

2. The Court erred in denying Plaintiff's motions for a directed verdict upon the Plaintiff's first, second and fifth causes of action at the conclusion of the testimony and evidence.

3. That the Court erred in admitting into evidence Defendant's Exhibit "T" for the reason that said exhibit was not a part of the contract between the parties and was prejudicial to the case of the Plaintiff because said exhibit was not competent, relevant or material to the issues of this proceeding.

4. That the Court erred in permitting Mr. Wyke, a witness called in behalf of the Defendant, to testify as an expert, for the reason that said witness was not competent and qualified as an expert upon

the issues in this proceeding, and his testimony, being admitted by the Court over objections of the Plaintiff, was prejudicial to the Plaintiff's case.

5. That the Court erred in permitting, over objection of counsel for the Plaintiff, the Defendant and his witnesses to testify contradictory to the terms of the contract between the parties.

6. That the Court erred in refusing the Plaintiff and his witnesses to testify regarding the effect of construction trade customs and practices relating to Defendant's use and occupancy of the building before completion, the exclusion of such testimony being prejudicial to the Plaintiff.

7. That the two verdicts returned by the jury are inconsistent under the law applied by the Court, in this case, in its instructions to the jury.

8. That verdict No. 1, in favor of the Plaintiff and against the Defendant, is contrary to the preponderance of evidence in this case because the Defendant failed to produce evidence sufficient to establish a valid defense to any of the Plaintiff's causes of action and upon the evidence before the Court, the Plaintiff, if he is entitled to recover at all, is entitled to recover the full amount of his claim as established by his evidence.

9. That verdict No. 2 is inconsistent with verdict No. 1 and also inconsistent with the law as applied to the evidence by the Court's instructions to the jury in this cause and the Defendant is not entitled to recover from the Plaintiff any sum whatsoever if the jury's verdict in favor of the Plaintiff and against the Defendant be allowed to stand.

Wherefore, the Plaintiff respectfully moves the Court to enter judgment in favor of the Plaintiff and against the Defendant, notwithstanding the verdicts herein, in the amount of Seventeen Thousand One Hundred Seventy-Four and 16/100 Dollars (\$17,174.16) and that the verdict in favor of the Defendant and against the Plaintiff be set aside as contrary to the evidence herein and as being inconsistent with the laws applicable to the issues of this proceeding or that the Court, in the alternative, set aside both verdicts and grant a new trial to the Plaintiff upon all issues in this cause.

PLUMMER & ARNELL,
/s/ E. L. ARNELL,
Attorneys for Plaintiff

[Endorsed]: Filed October 13, 1952.

[Title of District Court and Cause.]

M. O. RE FILING OF MOTION FOR
NEW TRIAL

Now at this time upon the motion of Bailey E. Bell, of counsel for defendants, It Is Ordered that defendants in cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, plaintiff vs. Burton E. Carr and Jane Doe Carr, his wife, defendants, be and they are hereby given leave to file motion for new trial without waiving any rights in Re. pending action.

Entered October 13, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION FOR DEFENDANT
JUDGMENT NOTWITHSTANDING
VERDICT

Now at this time hearing on motion for defendant judgment notwithstanding verdict in cause No. A-7644, entitled Victor Gothberg d/b/a Gothberg Construction Company, Plaintiff, vs. Burton E. Carr, et al., Defendants, came on regularly before the Court, Edward Arnell, appearing for and in behalf of the plaintiff, and Bailey E. Bell, appearing for and in behalf of the defendant.

Argument had by both sides.

Decision reserved.—Entered: March 20, 1953.

[Title of District Court and Cause.]

M. O. DENYING MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT; MOTION
TO SET ASIDE VERDICTS, OR IN THE
ALTERNATIVE, FOR A NEW TRIAL

Now at this time arguments in cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, vs. Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, having been had heretofore and on the 20th day of March, 1953, and decision reserved,

Whereupon the Court now denied all motions and finds that plaintiff will recover from the defendant the difference between the amounts of the two verdicts and plaintiff to submit written judgment accordingly.—Entered: March 27, 1953.

In the District Court for the Territory of Alaska,
Third Division

No. A-7644

VICTOR GOTHBERG, an individual doing business as Gothberg Construction Company,
Plaintiff,

vs.

BURTON E. CARR and MARIE CARR,
Defendants.

JUDGMENT

The above entitled cause having duly come on for trial before Judge Anthony J. Dimond and a jury in the District Court, Third Division, Territory of Alaska, on the 22nd day of September, 1952, and the Plaintiff having appeared personally and by his attorneys, Plummer & Arnell, and the Defendant, Burton E. Carr, having appeared personally and by his attorneys, Bell & Sanders, and both sides having been heard, and the jury having returned, upon Plaintiff's complaint, a verdict in favor of the Plaintiff and against the Defendant, in the amount of Fourteen Thousand Two Hundred Fifty and 82/100 Dollars (\$14,250.82), and, upon Defendant's cross complaint, a verdict in favor of the Defendant and against the Plaintiff for Eight Thousand One Hundred Thirty-one and 63/100 Dollars (\$8,131.63); and both parties heretofore having filed certain motions, which are contained in the records of this cause, and the Court having heard arguments thereon and each and all of said motions having been denied,

Now it is,

Adjudged and Ordered:

1. That the Plaintiff, Victor Gothberg, do recover of the Defendant, Burton E. Carr, the sum of Six Thousand One Hundred Nineteen and 19/100 Dollars (\$6,119.19), said sum being the difference in favor of the Plaintiff between the verdicts returned by the jury, together with interest upon said sum at the rate of Six per cent (6%) per annum from the 1st day of March, 1951.

2. That the Plaintiff recover his costs to be taxed by the Clerk of this Court pursuant to the Federal Rules of Civil Procedure.

3. That neither party be allowed attorneys' fees.

4. That the Plaintiff, upon the notice of garnishment returned herein on the 19th day of May, 1952, recover judgment against Jack Akers and Sherman Johnstone, in the amount of Plaintiff's judgment and said garnishee defendants are hereby required to forthwith pay said sum to the Clerk of this Court, out of the money under their control and that thereupon they be discharged as garnishees herein.

5. That execution issue therefor.

Made and ordered entered this 10th day of April, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed April 10, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Victor Gothberg, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 10th day of April, 1953.

/s/ E. L. ARNELL,
Attorney for Plaintiff-Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed May 8, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the Defendant, Burton E. Carr, and Jack Akers and Sherman Johnstone, judgment debtors in the above entitled cause, and file this their Notice of Appeal from the final judgment rendered herein on the 10th day of April, 1953. Said appeal to be taken from this Court to the United States Court of Appeals, Ninth Circuit, at San Francisco, California.

BELL & SANDERS
/s/ By BAILEY E. BELL,
Attorneys for Defendant-Appellee.

Acknowledgment of Service attached.

[Endorsed]: Filed May 8, 1953.

[Title of District Court and Cause.]

M.O. FIXING SUPERSEDEAS BOND
ON APPEAL

Now at this time on Court's own motion,

It Is Ordered that Supersedeas bond in cause No. A-7644, entitled Victor Gothberg, an individual d/b/a Gothberg Construction Company, plaintiff, vs. Burton E. Carr and Jane Doe Carr, his wife, defendants, be, and it is hereby, fixed at \$7,500.00.

Entered May 8, 1953.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant will rely upon appeal are:

1. That the Court erred in denying appellant's motion for a directed verdict upon appellant's first, second, and fifth causes of action at the conclusion of the testimony and evidence.
2. That the Court erred in denying appellant's motion to dismiss appellee's cross-complaint at the conclusion of appellee's evidence in support thereof.
3. That the Court erred in entering, over appellant's objections thereto, judgment based upon the two verdicts herein for the reasons that said judgment is contrary to the evidence and contrary to law.

4. That the Court erred in denying appellant's motion for judgment, notwithstanding the verdicts or in the alternative for a new trial for the reasons:

(a) The verdicts are inconsistent.

(b) Verdict Number 1 is contrary to the evidence and appellant is entitled to recover the full amount of his claim.

(c) Verdict Number 2 is inconsistent with Verdict Number 1, and appellee is not entitled to recover against appellant.

5. That the Court erred in admitting, over appellant's objection, in evidence appellee's exhibit "T" for the reason that said exhibit was not part of the contract between the parties and was incompetent and prejudiced.

6. That the Court erred in permitting, over appellant's objections, the appellee and his witnesses to testify contradictory to the terms of the written contract between the parties.

7. That the Court, to appellant's prejudice, erred in excluding appellant's evidence of construction trade customs and practices relating to appellee's acceptance of the building by using and occupying the same.

/s/ E. L. ARNELL,
Attorney for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed July 29, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, M. E. S. Brunelle, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation and stipulation of counsel, I am transmitting herewith the original papers in my office dealing with the above entitled action or proceedings, and including specifically the complete record and files of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation and stipulation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled cause by the above entitled Court on April 10, 1953, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of
Alaska, Third Division.

In the District Court for the District of Alaska,
Third Division

No. A-7644

VICTOR GOTHBERG, an individual doing business as Gothberg Construction Company,
Plaintiff,

vs.

BURTON E. CARR and MARIE CARR,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Anchorage, Alaska, September 22, 23, 24, 25, 29, 30, October 1, 2, and 6, 1953.

Before Honorable Anthony J. Dimond, United States District Judge, and a jury.

Mr. Edward L. Arnell, Attorney for Plaintiff.

Mr. Bailey E. Bell, Attorney for Defendants.

Mary Keeney, Court Reporter. [1*]

On Monday, September 22, 1952, the above entitled matter came on regularly for trial in open court at Anchorage, Alaska, before The Honorable Anthony J. Dimond, United States District Judge.

The plaintiff appeared in person with his counsel, Mr. Edward L. Arnell.

The defendants appeared in person with their counsel, Mr. Bailey E. Bell.

A jury was duly selected, impaneled and sworn.

* Page numbering appearing at the top of page of original Reporter's Transcript of Record.

Opening statement was made by counsel for the plaintiff.

Mr. Bell: May it please your Honor and counsel in the case.

Court: Mr. Bell.

Mr. Bell: One of the defendants, Mrs. Carr, I noticed was not mentioned by Mr. Arnell and she has not signed the [3] contract and is not a party to any of the contracts and I presume that it may be dismissed as against her.

Mr. Arnell: There has been no dismissal yet.

Mr. Bell: I will move to dismiss it at this time so that I won't have to make any statement for her.

Court: Without objection, the action will be dismissed as to the defendant Marie Carr. Is there objection?

Mr. Arnell: There is objection, your Honor. We don't know the true situation with respect to the title of the property or contracts.

Court: Order will be set aside then temporarily until we find out what the situation is.

Opening statement was made by counsel for the defendants.

Court: Witness may be called on behalf of the plaintiff.

Mr. Arnell: At this time, your Honor, I would like to ask Mr. Bell to produce the original contract, the first contract that was signed by the parties.

Mr. Bell: Didn't I give it to you, Ed?

Mr. Arnell: No.

Mr. Bell: A copy is attached to my cross-com-

plaint, your Honor. I will give him the original if I have it here.

Mr. Arnell: If your Honor please, it is my intention to offer these as exhibits without submitting them to the witness—in conformity—

Mr. Bell: That is in conformity with the agreement, your [4] Honor. I have no objection.

Mr. Arnell: At this time, your Honor, we offer as plaintiff's exhibit No. 1, a contract between Gothberg Construction Company, signed by Victor F. Gothberg and Mr. Carr, the date of the contract being the 24th day of May, 1950. This is not signed.

Mr. Bell: I will get you one that is signed. I thought I gave you one. I am sorry. Ed, you must have the original—that is the only one we have there. We will admit that Burton Carr signed it.

Court: The instrument offered may be without objection admitted in evidence as plaintiff's exhibit No. 1, and it is admitted that it is one of the contracts. Is it the first contract?

Mr. Arnell: The first contract.

Court: The first written contract entered into between the parties. I think it should be read so the jury knows what it is about. That is a contract of what date?

Mr. Arnell: May 24, 1950.

Court: And it is signed by the plaintiff and by Mr. Carr, one of the defendants. Is that correct?

Mr. Bell: It was signed by Burton E. Carr.

Mr. Arnell: This does not bear the signature of Mr. Carr.

Court: The jury will understand that Mr. Carr signed the original contract. [5]

Mr. Bell: Yes, we admit that, your Honor.

Court: In fact, as I understand counsel for the defendant, the defendant has pleaded that that contract was entered into.

Mr. Bell: That's right. I attached a copy to my pleadings.

Court: Yes. It will take some time, ladies and gentlemen, to read these contracts but I am afraid nobody will understand the subject unless they know what contracts were made in the beginning.

Mr. Arnell: Ladies and gentlemen, this contract between Mr. Gothberg and Mr. Carr is identified as plaintiff's exhibit No. 1.

Exhibit No. 1 was then read by counsel for the plaintiff.

Mr. Arnell: At this time may it please the court, I would like to offer as an exhibit on behalf of the plaintiff a contract dated the 19th day of September, 1950, between Mr. Gothberg and Mr. Carr. This appears to be an original contract signed by both parties.

Mr. Bell: I have no objection, your Honor.

Court: Without objection it is admitted and may be read to the jury—plaintiff's exhibit No. 2. This contract is dated September, 1950?

Mr. Bell: That's right, your Honor.

Court: And the other one was dated May 24, 1950? [6]

Mr. Bell: Yes.

Plaintiff's Exhibit 2 was then read by counsel for the plaintiff.

Mr. Arnell: At this time, your Honor, pursuant to the understanding that was arrived at in Chambers this morning, I would like to offer as an individual exhibit the first plan that was drawn by Mr. Anderson, the date of that plan being April 5, 1950, and the proffered exhibit being designated as BCG1.

Mr. Bell: Your Honor, the same is in your office. I object to it for the reason we don't seem to have anything like that in our plans. If we do we have no objection at all. These are all initialed by Mr. Gothberg that we have and if we have it we have no objection to it at all, but we just don't seem to have that particular one. Your Honor, I don't believe it would be admissible anyway, because I think that is the plan that was possibly a plan that was started with by Breeden and Smith, and then there was a revised plan that was the first plan that these people had anything to do with, so therefore, unless it is identified, we sure object to it because we don't have a copy of it.

Court: Unless it is identified——

Mr. Arnell: It is already identified in the contract, your Honor, as BCG1, dated April 5, 1950.

Court: Counsel for defendants were shown it this morning. [7] I thought it was agreed that this is one of the papers in the case. My understanding was that counsel reserved possible objection to that one because they were not able to find a copy of it and they were relying upon it. I believe it is

necessary to identify it and show it as a paper in the case before admitting it in evidence.

Mr. Arnell: I will call Mr. Gothberg then.

Court: Mr. Gothberg may be sworn.

VICTOR F. GOTHBERG

was called as a witness and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Mr. Gothberg, will you state your full name, please?

A. Victor F. Gothberg.

Q. Are you the Victor F. Gothberg whose name appears in the two contracts which have been admitted into evidence here?

A. That's right.

Q. Mr. Gothberg, I hand you a sheet of paper and ask you whether you can identify it.

A. I do.

Q. Will you state to the court and to the jury what that document is?

A. This plan covers the specification which was introduced for evidence and covered this plan. That was the work I figured—Four hundred twenty-five and forty—something like that—to [8] revise the wall in the front, move that back twelve feet and also move the wall in the back back twelve feet. That is a lot of trouble for \$2500.

Q. Are you personally acquainted with Mr. Anderson, whose name appears on the document?

A. I am.

Q. According to the information given to you,

(Testimony of Victor F. Gothberg.)

was that paper—was that prepared by Mr. Anderson to control the revision of the foundation portion of the building?

A. At the time this was the only plan that was had.

Mr. Bell: Object to him testifying hearsay as to what Mr. Anderson said or what Mr. Anderson did unless he saw it—unless he knows Mr. Anderson drew it.

Court: Overruled.

Mr. Arnell: We wish to renew our offer, your Honor.

Mr. Bell: Object to it as incompetent, irrelevant and immaterial and not within the issues and not properly identified. The engineer is in the room that is supposed to have drawn it.

Court: Where did you first see it, Mr. Gothberg?

Mr. Gothberg: Mr. Carr brought it up to me to figure the job.

Court: Mr. Burton Carr, the defendant?

Mr. Gothberg: That's right.

Court: He is the one that provided it for you?

Mr. Gothberg: He is the one that provided the man for me. [9]

Court: Objection is overruled then. It may be admitted and marked plaintiff's Exhibit 3. What short description can you give of it?

Mr. Gothberg: Foundation plan.

Mr. Arnell: It is identified in the contract, your Honor, as BCG1.

Court: You better ask the witness that. Is that

(Testimony of Victor F. Gothberg.)

identified in the contract by some numeral or number or letter—or don't you know?

Mr. Gothberg: I believe that is the same number called for in the specification for that particular job.

Court: What notation is on it? What lettering or numbering does it bear?

Mr. Gothberg: BCG1.

Court: Let me see that last contract. Well, the contract dated September 19, 1950, says in part and I quote: "The following is an enumeration of the drawings. BCG1 Foundation Revision. Date: 4-5-50." Will you state whether or not plaintiff's Exhibit No. 3 is a copy, or what do you call that sketch?

Mr. Gothberg: Plan.

Court: The plan that you just had is the same to your knowledge as BCG1 mentioned in plaintiff's Exhibit 2—this contract of September 19th?

Mr. Gothberg: I wouldn't know if that is the same as that is the only plan I had to start. [10]

Court: All right.

Q. Mr. Gothberg, I have handed you some more documents. Will you state whether or not you can identify them?

A. This is the complete plan to furnish the building for that contract that was signed in September.

Court: How many sheets are there?

Mr. Gothberg: We received 9 or 10—

Q. Would you look at each sheet, Mr. Gothberg,

(Testimony of Victor F. Gothberg.)

and give the identifying number on them and the date they were prepared, and by whom?

A. I'm sorry. On the first sheet the number is—I can't read it.

Q. Would you state what that plan is designated?

A. It says the drawing of the floor plan and the—and the plan been wet so that number cannot be read there but that shows just the floor plan and the installation of the hoist and so on, drawing for the floor plan and the show room.

Q. What is the date of that first page?

A. I believe it is 7-5-50 or it could be 1-5-50. It is very dim there—the 5th, anyway, 1950.

Q. Maybe we can speed this up. Mr. Bell said if he could compare them we could avoid all these time-consuming questions.

Court: The court will stand in recess for ten minutes, and ladies and gentlemen, you will remember the admonition of the court as to your duty. The court will stand in recess ten [11] minutes.

The Court then at 3:10 o'clock p.m. recessed until 3:20 o'clock p.m. at which time the following proceedings were had.

Court: Without objection the record will show all members of the jury present. Counsel may proceed with examination.

Q. Mr. Gothberg, would you state again for the jury and the court what the documents are that you have before you?

A. This is the plan that covered the entire con-

(Testimony of Victor F. Gothberg.)

struction of the building and it consists of nine sheets and it is numbered from number 2 to 10.

Q. Do you recall from whom you obtained those? A. From Mr. Carr.

Q. Do you recall the approximate date that you obtained them? A. It was in September.

Q. Approximately the date that you signed the contract?

A. Yes—no—no, that was before that.

Q. Are those the documents submitted to you by Mr. Carr that were to govern construction of the entire building? A. Repeat, please?

Q. Are those documents the ones that were to govern the construction of the entire building?

A. That's right.

Q. And you had those at the time that you figured the amount you put on the second contract. Is that right? A. That's right. [12]

Mr. Arnell: We wish to offer these in evidence.

Court: Is there objection?

Mr. Bell: May I see them—the first one especially.

Court: They may be shown to counsel for the defendants.

Mr. Arnell: This, your Honor, was an extra sheet and there is an identical one in there that has been initialed by Mr. Gothberg so I presume Mr. Bell will have no objection.

Mr. Bell: No.

Court: How many sheets are there now?

Mr. Bell: That leaves nine sheets.

(Testimony of Victor F. Gothberg.)

Mr. Arnell: This is just a duplicate of 10.

Court: How many are there now?

Mr. Arnell: Nine.

Mr. Bell: Your Honor, we have no objection to them only one of them is so badly messed up from dirt and filth that it is hard to determine and if we can find an original—Mr. Carr has gone to see if he can't find number 2, I believe it is—you can hardly read it and I would like permission of the court to substitute one that is clearer. There is another set—the one with Mr. Gothberg's initials on it we would like to substitute for number 2. We have no objection to their being introduced.

Court: They may be admitted then and if there is any clearer copy it will be considered. This will be plaintiff's Exhibit No. 4, consisting of 9 sheets—Plans of the Building. [13]

Mr. Arnell: I wonder, your Honor, if they would like these given some sub-designation so that we can refer——

Court: You can put them all in separately if you wish—4-A, 4-B, and so on. The first one will be 4-A and they will run up from there on until the whole nine have been numbered in that fashion.

Mr. Bell: Your Honor, we have a nice clean set of them all so if Mr. Arnell will agree to substitute them, it is all right with me. It will save me introducing these. Here is a very clean set. As long as there is no dispute about anything in particular they can just be used by Mr. Arnell and me both

(Testimony of Victor F. Gothberg.)

and those others may stay in if you think it is necessary, Mr. Arnell.

Mr. Arnell: I don't know which would be easier for the jury to study.

Mr. Bell: And you and I can use those here and we can substitute them if it is necessary.

Mr. Arnell: May we have the board drawn over, your Honor, so that we can place plaintiff's Exhibit No. 3 on the board?

Court: Yes.

Mr. Arnell: Perhaps the witness can just hold it and point to it as he testifies.

Court: That will be very difficult.

Mr. Bell: Your Honor, I will waive the fact that it has to come in front of me. I will go over there. [14]

Court: Mr. Carr can move over, too. Move it up a bit further so it squarely faces the jury then they can see it—and here is a light that can be thrown upon it.

Mr. Arnell: Mr. Gothberg, would you step down by the board, please?

Q. Mr. Gothberg, will you state for the benefit of the jury what portion of the building existed at the time your contract was taken to revise the foundation?

A. The existing foundation was here, the dotted line that is in front, and we extended it here in the back. And this wall was already in so the contract was to move this wall here in front—move that back twelve feet—that would be this location, and also

(Testimony of Victor F. Gothberg.)

move this from here and move this wall here also back further.

Q. Mr. Gothberg, what was the depth of the old wall that was already constructed and did not have to be moved?

A. That was the same as this—three feet. This three-foot wall and one-foot footing so the total makes it four feet deep.

Q. Now this contract that you signed—which portions did you agree with Mr. *Gothberg* that you would install under that contract?

A. I agreed to tear this down—this part, and also tear this down and build a wall there instead.

Q. Now, was there any flooring that was to go into that contract at that time? [15]

A. No.

Q. There was no concrete slab contemplated?

A. No.

Q. If you recall, Mr. Gothberg, will you state approximately when you commenced construction or demolition of the two old walls?

A. I can't remember.

Q. When did you commence work on your contract you performed which you have just described to the jury?

A. Very shortly after the contract was signed. I don't remember.

Q. What stage was that work in at the time that you signed the second contract relating to the rest of the building?

A. It was all finished.

Q. When you say it was all finished, does that

(Testimony of Victor F. Gothberg.)

include some additional work? A. It did, yes.

Q. Mr. Gothberg, you have before you there on the board Exhibit 4-D, which is designated BCG5, part of the plans. Will you explain to the jury what that plan called for?

A. That is the plan that covered the partial basement for the furnace room or boiler room and that is this part here.

Q. What was the size of the basement?

A. The size is thirty-four by seventeen.

Q. And where is that basement located with reference to the [16] plaintiff's other Exhibit No. 3, that you have?

Q. That didn't show that because it wasn't on the plans.

Q. But where is that basement shown by Exhibit No. 4? A. It is right here.

Q. Approximately when did Mr. Carr ask you to install the basement?

A. It was very shortly after I had started the job.

Q. Do you recall approximately when it was?

A. I couldn't state the date. I would have to look that up.

Q. With that change would you explain to the jury what additional work was required of you to be done in order to construct the basement?

A. Instead of a four-foot wall I had to extend that to nine feet deep and also excavate this part down to eight feet, and also build the stairs down to the basement which will be here. The stairs is

(Testimony of Victor F. Gothberg.)

sown here—and also install a fire door over to the boiler room for fire prevention.

Q. Of what were the stairs constructed?

A. Concrete.

Q. And what is the thickness of the wall?

A. Eight inches.

Q. Did you have to pour a concrete slab over the basement also? A. That's right.

Q. Now will you designate, Mr. Gothberg, the specific extras [17] that you have included in your first cause of action?

A. Extend the depth of the wall approximately five feet deeper, build the stair, put in a fire door here, digging a fuel tank here for sewer disposal and for water, and furnish material and labor for doing this work. Steel, and also put a slab on top of it, which also is concrete.

Q. On the original contract, the price of \$2542.00 was for the amount of work that was required under Exhibit No. 3. Is that correct?

A. That is correct.

Q. And you submitted to Mr. Carr a bill for \$4,051.84?

Mr. Bell: Object to leading the witness. The question is leading and suggestive.

Court: Overruled.

Mr. Bell: Exception.

Q. What was the additional amount that you charged Mr. Carr by way of extras?

A. Approximately \$1500.

Q. The \$1500 included all of the work that is

(Testimony of Victor F. Gothberg.)

required by the plan which is designated BCG5, is that right? A. That is right.

Mr. Arnell: Do you want to return to the stand, Mr. Gothberg, please?

Q. Mr. Gothberg, I hand you a document and ask you to state whether or not you can identify it.

A. That is correct.

Q. What does it represent?

A. That includes the extra construction of the concrete walls and also includes for the extra work for building the boiler room.

Q. Did you deliver the original of that statement to Mr. Carr? A. I did.

Q. Do you recall the specific date on which you made the deal?

A. That was sometime in November.

Q. What is the date of the statement?

A. That's 2-23-51.

Mr. Arnell: We wish to offer the exhibit in evidence, your Honor.

Court: It may be shown to counsel for defendants.

Mr. Bell: I didn't understand when he said he delivered the statement to Mr. Carr.

Mr. Gothberg: He got one every month.

Mr. Bell: We will agree, your Honor, that the statement was delivered to us on March the 4th, 1952, and if he wants to introduce it on that agreement—

Mr. Arnell: The statement, your Honor, is dated

(Testimony of Victor F. Gothberg.)

the 23rd day of February, 1951. We ask Mr. Carr to produce the original of the statement.

Mr. Bell: He did produce this copy, your Honor, but our records show that it was delivered March the 4th, 1952. I [19] don't know that it would make any difference.

Court: You may ask the witness when, to the best of his knowledge, that statement was delivered.

Q. Was that statement, Mr. Gothberg, delivered on or about February 23, 1951?

A. That was—but he had a copy of that before. He had that in November. It only covered the foundation.

Q. When you stated, then, that he had a copy in November, you meant you had sent him a prior bill. Is that your testimony?

A. This is a copy of the first bill.

Q. And this is the final statement that you sent to him? A. Right.

Mr. Arnell: We renew our offer.

Court: The objection is overruled. It may be admitted and marked Plaintiff's Exhibit 5 and may be read to the jury.

Mr. Arnell then read Plaintiff's Exhibit 5 to the jury.

Q. Now, Mr. Gothberg, calling your attention to this exhibit which you have just identified, have you made demand upon Mr. Carr for payment of that sum? A. I have.

Q. On more than one occasion?

A. On quite a few occasions.

(Testimony of Victor F. Gothberg.)

Q. Has he paid you any portion of that money that is reflected in this statement? [20]

A. No.

Mr. Bell: Your Honor, Mr. Arnell and I both have an exact copy of the specifications except his is minus one page, and Mr. Carr has gone to get ours which has that one page in it, and I will agree he may introduce it when he is ready for it at any time, and I will furnish him that one, too, as an extra page in it.

Court: Very well.

Mr. Arnell: May it please the court then, I have offered this document, which purports to be the specifications which relate to the construction of the building involved in this action. As Mr. Bell has informed the court, there is one page missing here, but I don't think it is material. Perhaps it may be later. We can substitute later.

Mr. Bell: It will just double the exhibits and confuse the jury that two exhibits just alike will be in evidence, except that one has a page Mr. Arnell's does not have. It will just be a moment.

Court: Very well—we can wait.

Mr. Arnell: At this time, then, may it please the court, I will offer Mr. Bell's copy of the specifications.

Court: Very well. They may be admitted and marked Plaintiff's Exhibit 6. These are the specifications for the building?

Mr. Arnell: Yes, they are. [21]

Court: Well, if there is no objection, they may

(Testimony of Victor F. Gothberg.)

be considered as read because it would be tedious, useless labor to read them.

Mr. Arnell: I hope we don't have to read them.

Mr. Bell: I didn't understand you, your Honor.

Court: I said, the exhibit is admitted without objection and marked Plaintiff's Exhibit 6—Specifications for the Building—and considered as read.

Mr. Bell: That's all right.

Court: And either party may use it in their arguments.

Mr. Arnell: I hate to bring this board back again, your Honor, but I think we will have to.

Court: Do you wish the witness to step down?

Mr. Arnell: Yes, your Honor.

Q. Mr. Gothberg, calling your attention to Plaintiff's Exhibit 4-A, which is designated as BCG2 on the bottom there, would you explain as briefly as possible for the benefit of the jury with respect to the partitions, ramp, the gas pumps, the hoists, and the locker rooms, furnace room, and all other details that are shown there?

A. Included in this—to start with—on the plan, what it called for—and furthermore it called for in the specifications—the only thing I was going to do according to that was build the walls outside, all around, and get the roof on, and build this wall over to here—and then here's the [22] rest room—that is this part here—and also one over here, for men to go in and have lockers, and so on, for the clothes. That is this here. All the rest for the finish inside the building was supposed to be extra—which

(Testimony of Victor F. Gothberg.)

called for in the specifications. All finishing I had to do was this here—and this from here. All the rest was extra.

Q. Now, Mr. Gothberg, what was the original location of the ramp in front of the garage?

A. The ramp is over here. It goes out like this and follows this line here—over to here—and then he wanted also this covered with concrete so that was extra for this part here from the door.

Q. Will you explain to the jury what type of construction was required under the specifications?

A. I believe it was five-inch concrete—or maybe it was six-inch.

Mr. Bell: Object. The specifications would be the best possible evidence. They are in evidence and his opinion would not be permissible.

Court: If it is important, you had better refer to the specifications right now—otherwise it will be taken up later.

Mr. Arnell: I didn't mean to elicit the size of the blocks. Mr. Bell is right. The purpose was to elicit the type of material that was to be used in the construction.

Court: The jury will understand that the specifications [23] are the best evidence.

Mr. Gothberg: It was concrete slab reinforced with six-inch mesh.

Q. Are you referring to the ramp in front of the garage, Mr. Gothberg? A. That's right.

Q. The specifications called for six-inch wire mesh. Such wire mesh was not installed, was it?

(Testimony of Victor F. Gothberg.)

A. It was not.

Q. Did you have any discussion with Mr. Carr regarding the use or failure to use mesh?

A. I did, right.

Q. Do you recall the approximate date of that?

A. No, I don't, but that was one or two days before it was poured.

Q. Was the ramp poured early in the construction stage of the building, or later?

A. It was poured later.

Q. What discussions did you have with Mr. Carr with reference to the wire?

A. As Mr. Carr was furnishing the wire mesh—and there was nothing left of that—it just covered the floor instead, so in that case I talked to him—and I couldn't get any at the time in town—nobody had it and it would take a long time to get it from the states—so I said that I wouldn't [24] guarantee—that I would pour and there would be no cracks, or anything like that—and also pour in more concrete. I mixed some concrete in.

Q. When you say you put in more concrete, Mr. Gothberg, do you mean you made it thicker?

A. A different mix.

Q. What mix was used?

A. Five and one-half and six.

Q. Is that a stronger concrete slab construction than the other concrete would have been with the use of wire?

A. It is, yes, just as strong, anyway.

Q. Now, Mr. Gothberg, will you point out to the

(Testimony of Victor F. Gothberg.)

jury what portion of that plan which represents the show room?

A. Yes, this part here. Just about this section here.

Q. What does that dark line across the building from one sidewalk to the other represent? A partition?

A. That is the cinder block partition.

Q. Now was that type of construction used to erect that partition, Mr. Gothberg?

A. It was not.

Q. What type was used?

A. Regular frame woodwork—and asbestos siding on this side—and sheet rock on the outside—and plywood.

Q. Was the partition constructed in the same place it was called for in the plans? [25]

A. No, it wasn't. I believe it was moved to here some place. I can't remember now—but it was moved some.

Q. How high was the partition that you installed?

A. It was about twelve feet, but I could only install eight feet.

Q. Mr. Gothberg, looking at that plan, these appear to be rooms, or something. Would you describe to the jury what those are?

A. That is the sales bar. You see, they got the parts in here—so that is what they used for a counter there—and this is an office—this part is an office, and, also, this is an office.

(Testimony of Victor F. Gothberg.)

Q. When you spoke a moment ago, you referred to some finishing work, Mr. Gothberg. Would you explain to the jury what was included within the term "finishing work" under the contract and specifications?

A. Finish work is covered all inside—I believe it was—with plywood—and all the walls up to here—to this part—and this wall, I believe, is covered with plywood, if I'm not mistaken—and the same thing here, and also this one here—and this side is covered with sheet rock, and also asbestos board—and this counter—for that matter it was another party that installed that—it is mahogany, I believe, or plywood, and also this counter here.

Q. Was all of this finishing work included within the \$38,000 [26] contract or outside the scope?

A. All outside.

Q. Now there are two rest rooms shown on the back wall there. Would you explain to the jury what was done with respect to the completion of those?

A. That is completed in here with sheet rock inside—and also ceiling—and the door and base—that is all finished, and included in my contract, but this part—there is three doors, which is also included in the finish, which didn't come under my contract. That is extra.

Q. Now for the benefit of the jury, Mr. Gothberg, will you show where the compressor originally was to have been installed?

(Testimony of Victor F. Gothberg.)

A. The compressor is supposed to be here. That is the compressor here.

Q. What type of compressor were you led to believe was to be installed there?

A. That was supposed to be a smaller compressor.

Q. Where was the compressor finally installed?

A. We built a platform over the stairs here, and installed it here, which costs more to bring it up there from here—more piping and so on—to go out over there.

Q. Now, you have referred to the locker room that was required by the contract. Would you point that out to the jury?

A. Right along this line here. [27]

Q. Were there any revisions or modifications of that at the request of Mr. Carr?

A. There was. And instead of going this way, it is built out from here—and also two more lockers in this part here.

Q. Now, next to the locker room, would you state what those lines are that crisscross?

A. That is the hoist—automatic hoist—for lifting the cars.

Q. What type of hoist was originally described in the specifications?

A. In the specifications it called for a rotary hoist with only one plunger.

Q. Will you elaborate what you mean by one plunger hoist?

(Testimony of Victor F. Gothberg.)

A. Just one plunger here in the middle—which goes up and down to lift the car up. Now it is installed with two plungers, one here and one here, which cannot be turned—it just lifts the car up and down. And then it was hard digging at the time—the ground was frozen—so that includes the cost of the building, and that much more digging that hole, and installing the extra plunger. We also had to pour concrete in the bottom to set the plunger.

Q. Were you to make provisions for any hoist?

A. Yes, and also make provision for this one—and the extra expense—because it provided for a two plunger hoist instead of one.

Q. Who was to furnish the hoist? [28]

A. Mr. Carr.

Q. Who was to furnish the air compressor?

A. Mr. Carr.

Q. Now, would you explain to the jury, for their benefit, Mr. Gothberg, what change in plans was made with respect to the rear portion of the building?

A. Yes, it called for windows all up to the corner here—the whole wall there was a change made. One of these windows was eliminated—and instead of that window was installed one eight-by-eight overhead door in this section here.

Q. Was that door included within the original plans? A. No.

Q. Now will you explain, Mr. Gothberg, in a little further detail, the type of construction that was used in this building?

(Testimony of Victor F. Gothberg.)

A. Yes. You mean above the door?

Q. No, I mean the building as a whole. Did you have to pour concrete piling to support the walls and roof?

A. In front there—here it called for brick, but on account of this span here—those blocks, they are not guaranteed for any weight, so to overcome this we poured three pillars, one here in this corner, and one here, and one in this corner, which also brings up the cost considerably.

Q. Was that type of construction used in any other portion of the building, Mr. Gothberg? [29]

A. No.

Q. How was the other portion of the building supported?

A. That was supported by steel column, which is inside the building—and then truckers, so the truckers goes from one beam from this end here to meet this point, which eliminates, so there won't be any bucking on the wall.

Q. Now, who furnished all of the steel, Mr. Gothberg? A. Mr. Carr.

Q. Was the steel on the job site at the time that you signed the contract, or was it obtained later?

A. It was there—supposed to be there.

Q. What type of steel was that, Mr. Gothberg?

A. Structural steel—eight inch column, and I believe the beam across was also—I believe it was twelve-inch truckers.

Q. Was that fabricated steel, Mr. Gothberg, or did it have to be fabricated on the job?

(Testimony of Victor F. Gothberg.)

A. It was fabricated in Seattle.

Q. When you say fabricated, would you explain the contractor's meaning of that term with reference to this job?

A. It is prefabricated, so when it comes to the job the only thing you have to do is put screw bolts through the beams—and all there is to do then is to put in the screws and tighten it up. All that is done in the field and all the rest is done in the shop.

Q. Now, was there a door along the east wall of the lower [30] portion—

A. There is a door here — twelve foot door. Twelve by twelve.

Q. What type of door is it, Mr. Gothberg?

A. Overhead.

Q. When you say overhead, will you explain what you mean?

A. Swinging like this—but open up like this.

Q. How does it open? A. With electric.

Q. Electric motors? A. Yes.

Q. Under the contract, did you furnish the door?

A. Yes.

Q. Now, in the installation of the door, did you have any difficulty getting the door installed?

A. I had.

Q. Will you explain to the jury what that was?

A. This beam that came here—it was a high door, too—and there was just about ten feet—and this had to be the same distance, since I had the door which was twelve feet—so I had to move this door here and move it over here to get away from

(Testimony of Victor F. Gothberg.)

interference with the door — otherwise the door wouldn't open way up.

Q. Again, is that particular beam part of the prefabricated structure?

A. That was a beam prefabricated. [31]

Q. In other words, you didn't place it in the wrong place in the beginning?

A. No, in fact, I never saw the plan for the steel structure.

Q. Mr. Gothberg, you have before you there a sheet of the plans which is designated as BCG 8, and Plaintiff's Exhibit 4-G. Will you state what that plan represents?

A. That represents extension for the marquee. This marquee come outside the building—the building wall is there and then the marquee is here.

Q. Now, is the wall that you just referred to—the one running diagonally—the one you referred to in your former testimony that you poured with concrete? A. The wall was there, yes.

Q. Is that the wall that you poured, though?

A. This wall was there and that was included in the contract.

Q. Is there any steel framing in that marquee diagram, Mr. Gothberg?

A. Yes. There is a steel beam coming this way here.

Q. To what is that tied—if anything?

A. That is tied to this cross beam here.

Q. Now, does that center beam represent one of

(Testimony of Victor F. Gothberg.)

the cross beams that run completely across the building?

A. This one runs across the building but this one goes this way—and that is a lower grade on this one so it goes underneath this. [32]

Q. In the construction of that marquee, did you run into any difficulty?

A. I did, because there was no steel beam there.

Q. When you say there was no steel beam, Mr. Gothberg, what do you mean?

A. This steel beam wasn't on the job, according to the specifications. All the steel should be on the job and furnished by Mr. Carr.

Q. Was that steel beam that you pointed out there furnished? A. No.

Q. What did you do by way of construction to substitute for that?

A. I ordered this steel beam. The steel fabricator got an office down there on Third Avenue and they installed this beam, and the cost of the beam was \$500—and the installation was a little over sixty-three—and it called in my contract for the installation of this beam, but the beam should be furnished by the owner.

Q. You purchased the beam from the steel fabricators? A. I did.

Q. Did you bill Mr. Carr his portion of the cost of erecting the beam?

A. I billed him \$500—the cost of the beam.

Q. Did you bill him any other sum?

A. No, not on that part. [33]

(Testimony of Victor F. Gothberg.)

Q. In other words, the \$63 was a part of your own \$38,000 contract? A. That's right.

Q. Now, did you have to go in and make any revision to this plan at any time during the course of construction?

A. There was many changes.

Q. I am referring now, Mr. Gothberg, particularly to this marquee construction.

A. Yes, on account of this cinder block there was enough to take care of the fuse when it come up to the roof—and that had to be also installed.

Q. Did you just install an iron beam or did you install concrete support across there?

A. I poured concrete support.

Q. Was that called for in your original contract?

A. It was.

Q. When you say you purchased another beam was that used in the cement itself? A. No.

Q. Would you state to the jury where you installed that?

A. That is installed to hold the roof joist close to this point here. That don't show on this plan but the ends of the joists runs this direction—and then there was no beam for this so an iron beam had to be installed to hold this joist. [34]

Q. Was that iron beam a part of your original contract? A. No.

Q. Was that the one you referred to that you acquired from steel fabricators—or a second one?

A. This is a second one.

Q. Where did you obtain that?

(Testimony of Victor F. Gothberg.)

A. Same place.

Q. What was the cost of that?

A. I don't remember—but it wasn't as high priced because it wasn't a big beam.

Q. Mr. Gothberg, you have before you now Plaintiff's Exhibit 4-H, which is BCG 9, a part of the plans. Would you state to the jury what that represents.

A. It represents electric alarm.

Q. Now, can you briefly point out, Mr. Gothberg, what changes were made necessary by the moving of the compressor back into the corner.

A. The compressors—well, it would take much more piping because those pipes have to come up there, anyway. It took more piping to get over to this corners—so there was some extra for that—and also to build a platform.

Q. Were there any additional air lines needed?

A. There was quite a few extra lines ordered by Mr. Carr—in fact, I got a letter from the electrician in that matter—and requested to get more lines in there than was called [35] for.

Q. Did the addition of the concrete furnace room cause any additional change in the electrical plans, as shown there?

A. Oh, yes, because there's got to be more lines—two lines, no, I believe one only, in there—in the boiler room and other pipes had to go through that.

Q. Were there any changes in wiring necessitated by reason of the change from one type of hoist to another?

(Testimony of Victor F. Gothberg.)

A. There was some changes made in the wiring—but I really couldn't make a statement what it was. There was heavier wire—I believe it was three wires—when it called for two.

Q. Did you get billed additional for the difference in the cost of the wire?

A. I got billed from the City Electric for that.

Q. Did the change in the location of the partition across the building have any additional costs, Mr. Gothberg?

A. No, it really didn't.

Q. You have already described the fact that you had to move the steel beam above the door. Did that require any additional electrical work?

A. That electrical work was in already—so they had also to move the pipe over two feet.

Q. Did Mr. Carr make provision for the operation of a washing device in the building?

A. Yes. [36]

Q. Where was that located?

A. It was located in this part here.

Q. When was the location of that wash-mobile finally established?

A. I believe it is standing right there—well, I couldn't say for sure.

Q. Well, was the wash-mobile installation put in there after you revised the plan to provide for the door on the south end of the building?

A. Yes.

Q. Did the installation of that wash-mobile equipment necessitate any changes?

A. There were some changes on account of that.

(Testimony of Victor F. Gothberg.)

Q. Were they plumbing, or electrical, or both?

A. They was both—plumbing and electrical.

Q. Now, going back again for a moment to the outside ramp, Mr. Gothberg, would you point out approximately where the pump islands were originally designed for?

A. The pump island is right here.

Q. Is that the location it is in right now?

A. The location is here now. In fact, it was moved two times—or three.

Court: I think we shall have to suspend now. There are some criminal matters of pressing importance that have to be taken care of today. The trial of this case will be continued [37] until 10 o'clock tomorrow morning, and ladies and gentlemen, you will remember the admonitions to the court as to your duty. You may now retire and the court will take a recess for seven minutes.

Whereupon at 4:30 o'clock p.m., September 22, 1952, the trial of the above entitled cause was continued until 10:00 o'clock a.m., September 23, 1952.

Be it further remembered, that at 10:00 o'clock a.m., September 23, 1952, the trial by jury of the above entitled cause was resumed; the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And thereupon, the following proceedings were had:

Court: A report is that one of the jurors, R. E. Taylor, has had what is called car trouble on his way from Palmer this morning. He is expected to

(Testimony of Victor F. Gothberg.)

be in sometime this morning. I think we cannot wait for him and he will be excused from service on the jury and his place will be taken by the first alternate, Mr. Johnson. The court may call the roll of the jury.

The court then called the roll of the jury.

Clerk: Trial jury is all present, your Honor.

Mr. Arnell: If your Honor please, in order that the record might be complete on behalf of the plaintiff, I waive any objection to releasing Mr. Taylor, and approve the selection of Mr. Johnson as a regular juror instead of an alternate. I [38] discussed that possibility with Mr. Bell and assume he has no objection either.

Mr. Bell: Your Honor, we are just meeting the law when you put the alternate in his place. Of course we have no objection—couldn't have.

Court: If I were sure Mr. Taylor would be in soon I would wait for him but he may be delayed all morning and I think we are not justified. Therefore, Mr. Johnson will be asked to serve. Counsel may proceed with examination of the witness.

Q. (By Mr. Arnell): Mr. Gothberg, yesterday the name of Lorn E. Anderson was mentioned several times. Are you personally acquainted with Mr. Anderson? A. I am, yes.

Q. Did you have occasion to have any dealings with him in September and the following months of 1950? A. I had.

Q. Would you explain to the court and jury what dealings you had with him—and why?

(Testimony of Victor F. Gothberg.)

A. He was the engineer and he made the drawings—the plans—and he also supervised the job and saw to it that it was done in a workmanlike manner—and was on and inspected the job.

Court: You better repeat your answer.

Mr. Gothberg: He was the man who made the drawing for the [39] whole structure, except the steel—that was done before the job started. He was the one that supervised and had charge of it—and to see that everything was done according to plan and specification.

Q. When you say he supervised, Mr. Gothberg, you mean he was out on the job site?

A. He was out on the job — not all the time, but off and on.

Q. During the period of construction, he directed your activities? A. That's right.

Q. Did he also inspect it? A. Yes.

Q. I hand you a document, Mr. Gothberg, and ask whether or not you can identify it.

A. I do, yes.

Q. What is the date of the document?

A. December 28, 1950.

Q. By whom is it signed?

A. By Lorn A. Anderson, Engineer.

Q. Did you receive that from Mr. Anderson?

A. I did, yes.

Mr. Arnell: We wish to offer this letter, your Honor.

Mr. Bell: Object to it as incompetent, irrelevant and immaterial. It is after the time that it was

(Testimony of Victor F. Gothberg.)

stated in the opening statement that the engineer had been discharged for [40] failing to do something that met with the approval of the owners. Therefore it would not be binding upon the owner if the engineer had no authority to write it.

Court: Overruled. It may be admitted and read to the jury.

Clerk: Plaintiff's Exhibit 7.

Plaintiff's Exhibit 7 was then read to the jury by Mr. Arnell.

Court: Ladies and gentlemen of the jury, by overruling the objection and admitting that exhibit, I am not instructing you that Mr. Anderson had authority to act for Mr. Carr, but I think that until this moment the paper should be admitted and then at the close of all the evidence you will decide whether, when that letter was written, the engineer, Mr. Anderson, acted for Mr. Carr and had authority to act for him, and you will be guided accordingly in your decision as to the weight of that exhibit. Counsel may proceed.

Q. Mr. Gothberg, the first item in this exhibit is the eight by eight overhead door in the south wall. Is that the door to which your testimony yesterday referred? A. That's right.

Q. Was that order or directive of the engineer carried out by you? A. It was.

Q. And the door was installed? [41]

A. Yes.

Q. Item B directs you to remove a 3 by 6-foot, 8-inch door in the northeast wall and install a plate

(Testimony of Victor F. Gothberg.)

glass window. Would you step down and point at—would you point out where this change occurred, Mr. Gothberg, please?

A. This change was done here. They called for a door and that was eliminated—and instead it was full glass all the way through here. That was put in extra—glass here, where the door was.

Q. And Item C refers to a two by five by six slab over the boiler room stair landing?

A. It was here in the back for the air compressor. The air compressor is located here—so it was to build the platform.

Q. Was that slab installed as requested by the engineer?

A. It was requested by the engineer and also Mr. Carr.

Q. Item D refers to fuel pumps and change of position.

A. They was over even—where this post is—then was moved one time 16 inches, this way, and the next time it was moved all the way to this corner. This is where they are located now.

Q. Now Item E refers to a two-plunger hoist.

A. This is the hoist here—and there is two plungers on this one—one here and one here.

Q. Now, the two-plunger hoist was actually installed, was it? A. It was, yes.

Q. Item F of this exhibit refers to plate glass windows. Where [42] are those windows located?

A. The whole wall here—and also this one win-

(Testimony of Victor F. Gothberg.)

dow here—so the whole front there is one foot higher than called for on the plan.

Q. Would you explain to the jury where the spandrel concrete pour was. Item G in this exhibit refers to spandrel construction by pouring three columns.

A. One column here—and one column here—and one here, to get bearing for the roof joist to carry the roof. The center blocks has not bearing enough to hold up the roof. That is the reason for pouring this concrete.

Q. Was that type of construction used by you in completing the front of the building?

A. Yes.

Q. Now, were there other items that you installed, Mr. Gothberg, in addition to the items here which we have just been discussing?

A. Oh, yes, there was quite a bit more. All the trim in the whole front was extra.

Q. At the time that you received this letter from Mr. Anderson, did you discuss it with Mr. Carr?

A. Well, the most of it was installed already—so then I told Mr. Anderson I got to have a letter on it—that they really ordered it so I believed it was almost all completed at the time he wrote that letter. [43]

Q. Had you discussed these changes with Mr. Carr personally?

A. Yes, and he was the one that ordered it there, Mr. Arnell.

Q. Now, would you relate briefly for the jury,

(Testimony of Victor F. Gothberg.)

Mr. Gothberg, what the other extras are that you are claiming?

A. I don't remember them all because there was so many.

Q. You testified yesterday regarding the locker room.

A. That was extra, yes, and also built the locker room bigger than what it was called for on the plan.

Q. At whose request did you do that?

A. Mr. Carr.

Q. Did you have any discussions with Mr. Carr regarding the concrete ramp in front of the building?

A. Yes, and he also wanted that.

Q. What did you do?

A. It called for concrete up to this door here—and then he wanted concrete all the way through to the corner—so that is the part there that I poured concrete—and that was at Mr. Carr's request.

Mr. Arnell: You may return to the witness stand Mr. Gothberg. Your Honor, at this time I wish to offer a statement in evidence. Mr. Bell has indicated he has no objection to it.

Mr. Bell: I have no objection

Court: Very well, it may be admitted. Plaintiff's Exhibit 8 may be read to the jury. Perhaps the jury would like [44] to know from the witness what the statement is.

Mr. Bell: Your Honor, we are not admitting it as correct. I have just agreed we received the statement.

(Testimony of Victor F. Gothberg.)

Court: I think the jury understands.

Q. Mr. Gothberg, I have Plaintiff's Exhibit 8, which has been admitted. Will you state to the jury what it is?

A. This is a bill for enlargement of the locker room—and also extensions of the concrete ramp in front—and also moving the iron beam in the ceiling above the garage door—those three items—that is the bill for that extra.

Q. Was that statement delivered to Mr. Carr?

A. It was, yes.

Mr. Arnell then read Plaintiff's Exhibit 8 to the jury.

Mr. Arnell: May it please the court, at this time I wish to offer another statement. Mr. Bell has stipulated it may be admitted, I think——

Mr. Bell: We deny the accuracy of it, but we have no objection to the statement on the theory it was served on us. A copy of it was given to us.

Court: It is admitted. Plaintiff's Exhibit 9—and may be read to the jury.

Mr. Arnell then read Plaintiff's Exhibit 9 to the jury.

Mr. Kurtz: Does that have a date?

Mr. Arnell: No, this doesn't. I can ask the witness.

Mr. Kurtz: Also for Exhibit 8. [45]

Court: Will you speak a bit louder?

Mr. Kurtz: I asked Mr. Arnell if Exhibit 9 contained a date.

Court: Exhibit 7 is dated December 28, 1950.

(Testimony of Victor F. Gothberg.)

Exhibit 8 has no date upon the paper itself. I don't recall whether the witness made any statement of date or not. Exhibit 9—the one last read—apparently has no date. I cannot see any date upon it anywhere. If the juror or counsel wish to ask the witness any questions about these papers as to date they may do so. I think counsel—well, the court will ask the question. Do you know what date Exhibit 8 was given to the defendant? I will show it to you so you won't be mistaken about it.

Mr. Gothberg: I believe that the date is on the original that Mr. Carr got—probably the carbon copy didn't cover it.

Court: What about Exhibit 9? Do you know the date or approximate date on which that was served upon the Defendant?

Mr. Gothberg: I really don't—but it was early in the spring when this was delivered.

Court: That is all right. You may return it to the Clerk. Counsel may proceed.

Q. Mr. Gothberg, I hand you another document and ask you whether or not you can identify it.

A. That is the bill for extra—for plumbing.

Q. Just state whether or not you can identify it.

A. I do, yes. [46]

Q. Now, what is it?

A. That is extra for plumbing and steel beam—and electric and glass—and bill for electric extra.

Q. Was that bill delivered to Mr. Carr?

A. It was.

Q. What date does the statement bear?

(Testimony of Victor F. Gothberg.)

A. 3-1-51.

Q. Was that after this particular work had been completed? A. It was, yes.

Q. There is some documents attached to that statement, Mr. Gothberg. Will you state what they are? A. Yes, one February 19, '51.

Q. From whom?

A. From Anchorage Installation—and on the second, there is no date on that.

Q. From whom—

A. But it is all from Anchorage Installation.

Q. What is the last document?

A. The last one is from Steel Fabricating Corporation—and is dated January 1st, 1950.

Q. When you presented that bill to Mr. Carr, to the best of your knowledge, did you attach also the copies of the invoices which you have there?

A. He got all the copies of invoices.

Mr. Bell: Your Honor, we object to it for the reason [47] that it is incompetent, irrelevant, immaterial, not properly identified—never having been given to Mr. Carr—or, if it was given to an architect, it was after the plaintiff stated that the architect had been discharged and was no longer connected with the work—and the date of it is March 1st, 1951, long after any work was done out there—and I object to it on all the grounds stated.

The Court: The objection is overruled. It may be admitted. The weight of it is for the jury. It may be read to the jury.

Clerk: Plaintiff's Exhibit 10.

(Testimony of Victor F. Gothberg.)

Court: It may be considered as read and may be read in whole or in part by either counsel at any time.

Mr. Arnell: Will you agree, Mr. Bell, just to read the first statement?

Mr. Bell: Yes, Ed.

Mr. Arnell then read the first page of Plaintiff's Exhibit 10 to the jury.

Q. Now, Mr. Gothberg, you have an item here designated as a steel beam. Is that the steel beam you described to the jury yesterday, which had to be installed? A. That is the one, yes.

Q. What did the items listed as extra on plumbing refer to?

A. They was ordered by Mr. Carr. They was changing of the drain for the wash rack—and there was also pipe for the wash rack that we was changing—and also for the hoist—for [48] a two-plunger instead of one. That was an extra on that—and what else there was I don't remember all of it.

Q. You have also here another item for a steel beam amounting to \$142.56. Would you explain to the jury what that was?

A. The steel beam for holding up the roof for the main building.

Q. What did this item—glass—cover?

A. That was bigger glass in front than what it called for on the plan—one foot higher.

Q. Mr. Gothberg, I hand you another document and ask you to state whether or not you can identify it? A. I do.

(Testimony of Victor F. Gothberg.)

Q. Would you state what it is?

A. That is a bill for the total job.

Q. Did you give it to Mr. Carr? A. I did.

Q. What is the date of this statement?

A. 1-14-52.

Q. Had you given him a statement prior to that time?

A. I did—but it was based on percentage.

Q. Did you personally deliver this statement to Mr. Carr? A. I did.

Q. On or about the 14th of January of 1952?

A. Yes.

Mr. Bell: Object to this for the reason that it is outside [49] of the pleadings. It is not the statement sued upon and your Honor will remember that I filed a motion to make more definite and certain by furnishing us with an itemized statement in this case. It never was furnished and the record will disclose I did that—and asked for a Bill of Particulars on the account—and it come in at that time with what purports to be an account. It would be certainly unfair and it contains a lot of entries for interest items, and it would be misleading and detrimental.

Court: A Bill of Particulars is no longer permitted by the rules. The question of furnishing a definite statement is well within the discretion of the court and there are ample particulars for discovery by deposition. Therefore the objection is overruled. The statement is admitted. That does not

(Testimony of Victor F. Gothberg.)

indicate that it is correct—the witness states it is correct. The weight of it is for the jury.

Clerk: Plaintiff's Exhibit No. 11.

Mr. Arnell: There is one portion of this statement, your Honor, that I think we can agree can be disregarded. Mr. Bell, will you agree with me on that portion?

Mr. Bell: I raise no technical objection to that, but I understand the exhibit will go before the jury for examination at any time, and I believe that the exhibit should be read in detail if it is going in.

Court: The exhibit may be read. [50]

Mr. Arnell then read Plaintiff's Exhibit 11 to the jury.

Q. Now, Mr. Gothberg, under Item 3 of this statement, you have designated interior finishing, and you described that briefly yesterday. Will you state at whose request that was done?

A. At Mr. Carr's.

Q. And state generally, for the benefit of the jury, what it included?

A. All interior finishing.

Q. In the show room and sales department?

A. And partitions—and the show room and office.

Q. You have already testified to the other general items. Here you have listed a sign post and have made a charge of \$67.50. Would you explain to the jury how that charge arose?

A. That sign post was ordered by Mr. Carr. He requested me to install it so I had the steel fabri-

(Testimony of Victor F. Gothberg.)

erator install that for me—and that is what he charged me for the job.

Q. Where is that sign post in relation to the building?

A. On top of the marquee—just about the center of the building.

Q. Is it attached to any of the steel beams on the marquee?

A. It is attached to the iron beam from the inside.

Q. Did that sign post have any relation to these charges you describe in relation to the beams on the marquee?

A. No, that is separate for the iron beam and separate for the [51] sign post.

Q. You have here an item of triple door to the show rooms. Will you explain to the jury what that is?

A. The three doors that go in between the show room and the shop—and they were also ordered by Mr. Carr.

Q. Was all the interior finishing done in accordance with his instructions, Mr. Gothberg?

A. Yes.

Q. Now, do you recall the approximate date when you finished the contract or finished the work under the contract on the extras?

A. The extras, I believe was—I believe was finished February 17th, I believe, or 23rd.

Q. Of what year? A. 1951.

Q. At what stage of completion was the build-

(Testimony of Victor F. Gothberg.)

ing, Mr. Gothberg, at the time that Mr. Carr moved in?

A. My work for the contract—it was completed at that time.

Q. When you state “completed,” were there any minor work that had to be finished?

A. In front—there was quite a bit left in front to be done.

Q. Did you finish that work? A. Oh, yes.

Q. After he went in or——

A. Oh, yes. [52]

Q. At this time does there remain anything to be done to complete that contract in accordance with the specifications?

Mr. Bell: Object as incompetent, irrelevant and immaterial, and merely calling for a conclusion of the witness.

Court: Overruled. You may answer.

A. There is some small items to be done—and there is one plate glass that has to be replaced—and there is some kick plates on the door.

Q. Would you explain why the glass has to be replaced, Mr. Gothberg?

A. It was cut too small in the shop. It should be a quarter of an inch bigger.

Q. How much?

A. About a quarter of an inch bigger.

Q. Who cut the glass for you?

A. That was Alaska Glass and Paint.

Q. Are there any other items that you can think

(Testimony of Victor F. Gothberg.)

of that remain to be completed other than what you have mentioned?

A. A few pencil rods to cut off.

Q. Would you describe to the jury what that is?

A. Rods to hold the frames together when we are pouring concrete.

Q. Is there anything else?

A. No, I don't think I remember any more. [53]

Mr. Arnell: You may step down, Mr. Gothberg.

Court: The Court will stand in recess. Ladies and gentlemen, of the jury, during the recess you will remember the admonitions of the Court as to your duty, and the Court will stand in recess for 10 minutes.

The Court thereupon recessed at 11:02 o'clock a.m. until 11:12 o'clock a.m., at which time the following proceedings were had:

Court: Without objection the record will show all members of the jury present. Counsel for plaintiff may proceed with examination of the witness.

Mr. Arnell: We have concluded our examination, your Honor.

Court: Counsel for defendants may proceed with examination.

Cross Examination

Q. (By Mr. Bell): Mr. Gothberg, you had seen all of the plans and had initialed them in August? You had put your initials on the plans in August?

A. I had, yes.

Q. Then you had a full set of plans before you made the bid? A. I did have.

(Testimony of Victor F. Gothberg.)

Q. Now, did you examine Plan No. 1 before you started to work—that Plan No. 1 that you identified? [54] A. I did.

Q. Now, did you know that that plan had been complied with before you started work and that you were to cut off the concrete that had been put in by that plan? Did you so understand it?

A. This plan showed a change in that foundation.

Q. What I mean—you knew that that Plan No. 1 had been used by someone else and the foundation and walls had been put in before you bid, didn't you?

A. No, that plan had not been used by anybody else.

Q. It hadn't? A. No.

Q. And you want to tell the jury now that the foundation—that concrete work was not already in before you ever made a bid? A. It was.

Q. Oh, I thought it was.

A. Yes. This is a drawing of the old plan where the foundation was built before and this was made special for the alteration of that change in the foundation.

Q. You want to tell the jury that this particular plan here was made of work that was already done?

A. That's right.

Q. All right, now, did you remember seeing Plan No. 5 in here—

A. I saw them all. [55]

Q. Mr. Gothberg, you saw Plan No. 5 before you

(Testimony of Victor F. Gothberg.)

bid on that work, didn't you? Before you bid on the foundation? A. No.

Q. You never did see that?

A. No. This was after the bid was in.

Q. That's what you contracted to do for \$2500—and some dollars, wasn't it?

A. No, this is not included. That is the plan there. That's what I contracted to do for \$2500.

Q. Mr. Gothberg, you would know your initials if you saw them, wouldn't you? A. Yes.

Q. Would you please look and see if you wrote that there in the corner? A. I did.

Q. Well, then, you did see them, didn't you?

A. Not at the time this was initialed. When I took the final contract—when the foundation was in—that was in September. That's when I initialed this.

Q. When did you have the set of plans the first time in your possession?

A. Oh, there was only one sheet I have to go by.

Q. Now, you admit that you went by that plan, don't you? A. I did.

Q. That one shows it out close to the street, doesn't it? [56]

A. No, that shows the change to move it back.

Q. Yes, and this is the change that you did, isn't it?

A. This was extra—where Mr. Carr made his change before—it says on the plan where the boiler was going to stand. It didn't show anything on that plan.

(Testimony of Victor F. Gothberg.)

Q. Didn't you testify yesterday that all of these plans were given to you at the time you made the bid and furnished to you by Mr. Carr?

A. Not complete—not on the foundation.

Q. When did you first see the plans on the building—any plans at all on the building?

A. I can't make an exact date for that.

Q. It was all together, wasn't it, except that one?

A. All this was together—and that was separate.

Q. That was a separate plan that had been discarded?

A. That was the only one I had for the foundation—and then, besides, I had a sketch because this wasn't drawn. I just got a sketch—and after that I got the plans.

Q. So when you told your attorney yesterday you did it literally in accordance with this plan—you didn't?

A. That is exactly the same thing.

Q. And you did initial this, didn't you?

A. At a later date. It was after the work was completed.

Mr. Bell: I offer this in evidence.

Court: Without objection, it may be admitted and marked [57] Defendant's Exhibit A.

Mr. Bell: This is the one that's initialed by him.

Court: All right. Defendant's Exhibit A.

Q. Now, Mr. Gothberg, you never served any statements on Mr. Carr other than those statements you have described here yesterday?

(Testimony of Victor F. Gothberg.)

A. What kind of statements?

Q. Well, did you ever give him any itemized statement other than those?

A. For what purpose—for collecting bills, or for what?

Q. I don't know. Did you give him other statements other than those that you say you gave him?

A. He got statements every month—and most of the time I asked him personally. He said he didn't have it so I didn't make out any statement then.

Q. He told you he didn't have the money?

A. That's right.

Q. You stated that you went with him to the First National Bank a time or two about this matter? A. I did.

Q. You knew that money had been borrowed at the bank before you started, didn't you?

A. No, but I was promised by Mr. Cuddy. He promised that it would be paid.

Q. That it was there in the bank? Didn't he promise you that [58] the loan had already been approved? A. No.

Q. Did you ever ask Mr. Cuddy for any money on this bill? A. I did.

Q. How come you had to ask Mr. Cuddy for the money if you didn't know it was there?

A. The money wasn't there—so I didn't get it from Mr. Cuddy.

Q. But you knew it was supposed to be there, didn't you?

A. Yes, it was supposed to be there.

(Testimony of Victor F. Gothberg.)

Q. Did Mr. Cuddy tell you that you had not complied with your contract and come on back and do the work on that building and you would get your money? A. No.

Q. You know Mr. Cuddy is dead, don't you?

A. I know. If he wouldn't I would have the money right now.

Q. He didn't die until long after the building was finished, did he? A. No.

Q. The first statement you ever sent him for this foundation was \$4,000 and some dollars, wasn't it? A. That's right.

Q. You never sent him any other statement or never made any other charges?

A. There was a bill before that—a little less amount.

Q. Why did you send him a bill for a lesser amount? [59]

A. Because there was more work to be done after the job wasn't completed.

Q. Didn't you testify yesterday, that the foundation work was fully completed before you signed the contract to build the building?

A. Yes, but there was some in front there to knock out the wall down—that wasn't completed.

Q. When did you complete the foundation?

A. I believe it was in July.

Q. Then when did you finish it?

A. After the foundation itself—it was about a month.

Q. And you made the contract in June, didn't

(Testimony of Victor F. Gothberg.)

you? A. Something like that.

Q. Then you had it all done, then, sometime in July?

A. Yes, except in front—for knocking down the concrete.

Q. I hand you a statement and ask you to state if you didn't prepare that? A. I did.

Q. And why did you charge a different amount there?

A. Because it wasn't finished in front—to knock the whole wall down—it wasn't finished—so I had to do that work after.

Q. Do you notice the date on that statement?

A. 10-20-50.

Q. That would be October 20th, 1950. Did you date that yourself? [60]

A. No, I had a girl write that out.

Q. Did you give that to Mr. Carr?

A. I did.

Mr. Bell: We offer it in evidence.

Mr. Arnell: No objection.

Court: It may be admitted and may be read to the jury.

Clerk: Defense Exhibit B.

Mr. Bell then read Defendant's Exhibit B to the jury.

Q. You had forgotten about giving him that statement, hadn't you, Mr. Carr?

A. No, I didn't.

Q. Why did you give him one for an altogether different sum and charged more later?

(Testimony of Victor F. Gothberg.)

A. Because I had to lower the grades—so I had to knock over more concrete.

Q. You gave him that when the building was going up, didn't you? A. I did, yes.

Q. And the foundation, you just testified, was in in July, didn't you? A. That's right.

Q. Now, you made a contract with him to do certain work for \$38,450.00, didn't you?

A. That's right. [61]

Mr. Bell: May I have that exhibit—it is either 1 or 2, I believe it is 2—September the 19th?

Q. Mr. Gothberg, I am giving you Exhibit No. 2 for the Plaintiff and I will ask you to look that over and see if you find these words right on the face of the contract: "Article I—Scope of the Work—The contractor shall furnish all of the materials and perform all of the work shown on the drawing and described in the specification entitled Construction of a Nash Garage." Did you know that was there when you signed it?

A. I knew it was there.

Q. Did you know it was there when you attempted to give him bills for hundreds of dollars for extras?

A. That statement is in the specifications—what I was supposed to furnish and what Mr. Carr was supposed to furnish.

Q. You knew what was on the ground before you started, didn't you? A. Oh, yes.

Q. You checked it carefully? A. I did.

Q. Now, then, did you know what became of

(Testimony of Victor F. Gothberg.)

the beam that had to be replaced down there—the steel beam? Do you know what became of the original there? A. No, I don't.

Q. Well, when you checked the plans and specifications, you [62] checked all the steel and everything carefully, didn't you? A. No.

Q. Why didn't you?

A. Why should I?

Q. Well, you were going to furnish everything that wasn't there.

A. Mr. Carr was supposed to furnish that.

Q. Well, the contract that you signed says differently, doesn't it?

A. The contract is according to specification.

Q. And the specifications had the beam in it, don't they?

A. In the specifications it calls for Mr. Carr should furnish all structural steel—Page 1.

Q. The plans that you had yesterday shows that particular beam in the plans, doesn't it?

A. It does. It shows how to erect it.

Q. And it shows both those steel beams that you had attempted to charge him for?

A. The specifications called for Mr. Carr to furnish that.

Q. Show me something in the specifications where he was to furnish anything except what he had.

A. May I have the specifications? There is a special condition—footing and a foundation—as well as boiler room walls are in place. [63]

(Testimony of Victor F. Gothberg.)

Q. Where are you reading from—what page?

A. That is A—and B is that filling of existing concrete is complete. C—structural steel is on site, but is not in place and consists of so many pounds—it don't state.

Q. So he didn't represent anything to you about how many pounds of steel was there—you checked that yourself?

A. No.

Q. I see. Now, do you know whether or not this beam was there when you made the bid or not?

A. I don't know if it was there or not—as long as it states here I take it for granted that all the steel was there.

Q. Now, who was to preserve the equipment? Who agreed to preserve all of the equipment and take care of it during the construction of this work—did you do that?

A. What equipment?

Q. Everything that was on the ground. Did you contract by the specifications to take care of this stuff and see to it?

A. No.

Mr. Arnell: If your Honor please—I can't hear and listen to this—to Mr. Bell's question. They are argumentative and I think he can phrase them so the witness can answer them. The specifications are in evidence—

Court: If there is part of the specifications that puts the burden on the contractor to look after the property, it [64] should be brought to the attention of the jury. They will have to decide the case finally.

Mr. Arnell: I realize that, your Honor, but the

(Testimony of Victor F. Gothberg.)

method of Mr. Bell's phraseology is strictly argumentative. He makes a statement and asks the witness if he didn't do it and didn't agree to do so and so forth.

Court: The objection is sustained to the extent that counsel should invite the attention of the witness to some phrase that would bear upon this issue, if there are any.

Q. Now, Mr. Gothberg, referring to the special conditions—it is the second page, I believe. I will ask you if—about the middle of the page—if you read the same as I do: “SC-2, Items Furnished Without Cost to Contractor But to Be Installed by Him: A. Car Washing Rack, Model..... by, 2 gasoline pumps, Model..... by, and 2 gasoline storage tanks, 1500 gallons capacity, to be piped and buried beneath gasing apron. Air compressor of capacity to be placed in boiler room and connected to outlets at fuel pumps and to two outlets in vicinity of grease racks. E. One rotary car lift is to be installed and provisions made for the future installation of a second.” Do you read with me there? A. I do.

Q. Then you agreed to do that, didn't you?

A. I did. [65]

Q. Now, I will ask you—a little further down—SC-3, if you see these words: “Surveys and Grades. The contractor will make his own surveys and establish his own grades. SC-4. Responsibility Regarding Existing Utilities and Structures. The contractor shall be held responsible for any damage

(Testimony of Victor F. Gothberg.)

to, and for maintenance of existing utilities and structures." Do you see that? A. I see it.

Q. That was in there when you signed it?

A. It was.

Q. So if that beam was taken away from there, either you took it or you were responsible—

Mr. Arnell: I wish to renew my objection.

Court: Objection sustained.

Q. If the beam was there do you know what happened to it?

Mr. Arnell: Objection.

Court: The last question is in order.

A. No.

Q. Mr. Gothberg, you did not work nights there, did you? A. I did not.

Q. Did you have any watchmen on the job?

A. No, I didn't.

Mr. Arnell: If your Honor please, I wish to renew my objection—so far as the issues of this case are concerned, there is no showing that any steel beam was lost or stolen or [66] any equipment was lost or damaged or not taken care of.

Court: Overruled as to this question.

Q. Did you ever see the engineer there on the job in the daytime? A. Oh, yes.

Q. How many times did you ever see him there?

A. That I couldn't state—but it was quite a few times.

Q. Well, was it one, two, three times? How many times approximately?

(Testimony of Victor F. Gothberg.)

A. He came out there about two or three times a day anyway.

Q. Were you over there when he was there and Mr. Carr was there at the same time?

A. I believe only one or two times.

Q. Was that before the work started—or after?

A. That was after.

Q. And you are sure now—you tell the jury you are sure that you saw the engineer there at the same time Mr. Carr was there? A. I did.

Q. And were they together?

A. We met there—I don't remember for what purpose but I know for sure we met one time there—and we was all three there.

Q. Now in the specifications they describe all the plans that had any effect on any work you did there, did they? A. That's right. [67]

Q. You are sure of that? Do you have the specifications there? A. Yes.

Q. Would you turn to what would be the 4th page and tell the jury if Plan No. BCG 1 is ever mentioned? A. It is not.

Q. That is the plan you had here before the jury yesterday?

A. That is one I built the foundation by.

Q. Where did you get that plan?

A. From Mr. Anderson.

Q. Did you get that recently or had you ever seen it until recently?

A. That was on the job when I built it. That is the one I used when I built it.

(Testimony of Victor F. Gothberg.)

Q. Do you know why it was not mentioned in the specifications at all.

A. Because that work was done already—this specification just covered the main building after that work was done.

Q. And the specifications you have there covers the particular boiler room and the stairway, doesn't it? A. In this, yes.

Q. Well, doesn't those plans that you used when you bid cover that particular thing?

A. For the main building I used this specification, yes.

Q. Why do you claim you are entitled to extras then when the [68] contract provides that you will do that work under the terms of the contract?

A. Turn to Page 1—it states right there—fittings and foundations, as well as boiler room walls, are in place—which proved that it was built by that plan and not by this.

Q. And they were already done before you ever bid on the other building? A. Right.

Q. And then in the building plans you say you never did see No. 5 G until you bid on the building—is that right—or just before?

A. I only had a sketch on that, yes.

Q. Doesn't 5 BCG there show the elevations—I will ask you to see if that doesn't show that particular work, the stairway and the other things—I will ask you, Mr. Gothberg, if that stairs coming down from above—doesn't that show the boiler room, the walls and everything right in there?

(Testimony of Victor F. Gothberg.)

A. It does.

Q. That's what you did for your work, wasn't it?

A. That's for the extra there, yes.

Q. You agreed to do that for twenty-five hundred and some odd dollars, didn't you, in writing?

A. That contract only covers for moving of walls back.

Q. Is this your signature on this contract?

A. That's right. [69]

Q. And didn't you agree to do that for \$2,542.00 in writing? A. I did.

Mr. Arnell: If your Honor please, object to further questions along this line. It is repetition in the first place and it is argumentative in the second place. The witness testified three or four times about this phase of the case.

Court: Overruled. You may answer.

Q. That was dated 5-24-50? May 24th, 1950?

A. Yes, and this plan was made and came out 7-5-50.

Q. This print here was made 7-5-50?

A. Yes.

Q. And this contract was taken months before that print was made? A. Yes.

Q. Yet you say you did that all before you ever bid on the other contract? A. That's right.

Q. Didn't you have those plans before you all the time now—or a set of them?

A. I said I had a sketch—which is just exact duplicate of this—but I didn't have a regular plan at the time.

(Testimony of Victor F. Gothberg.)

Q. Didn't the engineer furnish it first in a sketch and then the blueprints were printed from the sketch? Isn't that right?

A. That's right. [70]

Q. And they are dated as they are printed?

A. Yes.

Q. Now, this letter—let me see that letter from the engineer, please, I believe it was introduced this morning, but I can't remember the number.

Clerk: Seven.

Q. This letter, Plaintiff's Exhibit 7, that is signed by Lorn E. Anderson and it is dated December 28, 1950. You stated that he gave it to you later. Now how much later?

A. Oh, most of the work was completed already. He gave me an order that as the work progressed—to do so and so—many changes.

Q. And all of the work he authorized in that letter you had already completed?

A. Most of it, yes.

Q. Did you ever make a bid or give an estimate to Mr. Carr or to him as to how much it would cost to do that extra work?

A. I did not. I said that the only condition I would take is time and materials.

Q. You did respect the contract you had with Mr. Carr, didn't you? A. That's right.

Q. Do you remember whether or not that contract provides that if there are any changes you will submit estimates of costs [71] to be approved or rejected before the work is done?

(Testimony of Victor F. Gothberg.)

A. I talked to Mr. Carr about that—and he said it isn't necessary—we will let it go as time and materials, so there never was done any such thing.

Q. So you abandoned the contract and did the work time and material?

A. On the extra, yes. The changing on the contract was never changed.

Q. Did you see this man, Anderson, when you got that letter from him? A. Oh, yes.

Q. Where was he when he wrote that letter?

A. Out in the district, I guess.

Q. Out on the base, was he? A. Yes.

Q. Did you go out there to see him?

A. No, he came to the job and give it to me right on the job.

Q. How come you know that he wrote it out on the base?

A. Because he was working there. I don't know whether he wrote it there or not.

Q. You are willing to testify he wrote it out on the base and you don't know?

Court: What difference does it make whether he wrote it out on the base, or in town, or on Cook Inlet?

Q. Do you know where he was when he wrote the letter? [72] A. I don't.

Q. Were you with him? A. No.

Q. Do you know the approximate date that he wrote the letter?

A. It states here the 28th of December.

(Testimony of Victor F. Gothberg.)

Q. Yes, but you told your attorney that it was delivered to you later at some other time.

A. No—I said it was delivered to me after the work was done because I asked him special to get that in writing—and so I did.

Q. Did you ask him for that letter after the controversy came up between you and Mr. Carr about this work there?

A. We talked it over before—and all those extras were supposed to be work under the condition of time and material.

Q. The engineer talked to you about it, did he?

A. Oh, yes.

Q. Was Mr. Carr ever present when any of those conversations took place?

A. I believe he was and if he wasn't—because I took orders from Anderson.

Q. You didn't take any orders from Mr. Carr? You took them from Mr. Anderson?

A. Yes, but all the time he was there.

Q. How long was he there?

A. Around Christmas time—or New Year's. I know he was there [73] after New Year's—I don't remember the date.

Q. You never did make an estimate then as to these extras and submit it to Mr. Carr or to the engineer?

A. I never did.

Q. All right now—on this 8 by 8 door in the south wall—was the wall laid up at the time the 8 by 8 door was decided upon?

A. It was not.

(Testimony of Victor F. Gothberg.)

Q. And then the door was added before you laid the south wall? A. That's right.

Q. Now, did you ever submit an estimate to Mr. Carr or to the engineer as to what that 8 by 8 door would cost installed? A. No, I never did.

Q. Now, you refer to changing the fuel pumps. Did you set the fuel pumps yourself? A. No.

Q. Did you ever set any of the fuel pumps?

A. No.

Q. Then you didn't change the pumps at all, did you? A. No.

Q. Well, now, then this hoist that you have referred to—it was originally a one-plunger hoist that was supposed to have been installed?

A. Right.

Q. Did you see that hoist before you started working there? [74] A. No.

Q. You didn't see it? A. No.

Q. Now, that hoist was here a long time before it was used, wasn't it?

A. No—not that I know of—he was supposed to deliver it to the job and he delivered it—I believe it was the 29th of December.

Q. Are you sure it was the 29th of December?

A. I wouldn't be more than two days off.

Q. Now, why didn't you put in preparations for the second hoist, as provided in the specifications there? A. That's done—that there.

Q. What is done in the way of preparation for the second hoist? A. The pipes.

Q. What pipes? A. For all.

(Testimony of Victor F. Gothberg.)

Q. Is it for a one-plunger hoist, or for a two?

A. That's for a two.

Q. When did you put those in?

A. The same time as I put in for the other one.

Q. Is the openings for the setting of this hoist there now?

A. It is provided for opening the frame—it is providing for the opening. [75]

Q. But you poured the frame? A. Right.

Q. There is no holes in it? A. No.

Q. No place where he could find any connections or anything for this second hoist, is there?

A. That couldn't be done because they didn't have the hoist there.

Q. Why did you contract to do it?

A. That's provided for—the second one—but the frame had to be poured.

Q. And you didn't leave any openings in the frame for the second hoist?

A. There is poured one slab—like this—where the hoist is supposed to be installed—and that got to be knocked out if he ever got another hoist.

Q. Then the bill that you charged him for the overhead door—you took the blocks out—the concrete or cinder blocks away, did you not?

A. I did, yes.

Q. You took the blocks away? A. Yes.

Q. Did you use them somewhere else, Mr. Gothberg? A. No, I still got them.

Q. Then you took the blocks out of the 8 by 8 hole and put the [76] door in the inside?

(Testimony of Victor F. Gothberg.)

A. I did, yes.

Q. You kept the blocks? A. I did.

Q. Now, the hoist that was put in there has just two plungers instead of one, as was originally planned? A. That's right.

Q. Does the air go from the compressor to one separate— A. Separate to each plunger.

Q. Does that connection go directly to and connect up with the compressor?

A. That's right.

Q. And that's the way you fixed his down there, is it? A. Right.

Q. Were you there when it was put in?

A. No, I don't think I was. Anchorage Installation did that work for the piping.

Q. And you don't know then—and you are charging him for the Anchorage Installation bills in there, aren't you?

A. I am, yes. No—no—it is a percentage, I believe, that was charged—40% on that bill.

Court: We will suspend until 2:00 o'clock this afternoon. You may step down. Ladies and gentlemen of the jury, during the recess you will remember the admonitions of the Court as to duty and you may now retire. The Court will remain in session. [77] Return at 2:00 o'clock.

Whereupon at 12:01 o'clock p.m., the trial of the above entitled cause was continued until 2:00 o'clock p.m.

Be It Further Remembered, that at 2:00 o'clock p.m., the trial by jury of the above entitled cause

(Testimony of Victor F. Gothberg.)

was continued, the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Counsel for defendant may proceed with examination of the witness.

Q. Mr. Gothberg, would you look at this map here—this plat—and see if that is your initials on there? A. That is right.

Q. Did you put it there? A. I did.

Q. Was that in your possession when you made the bid? A. Oh, yes.

Q. And you then made the contract knowing exactly about this? A. Oh, yes, I knew.

Q. And, Mr. Gothberg, what does this drawing right through here represent?

A. That is the walls.

Q. Is that a wall? [78]

A. That is right.

Court: The jury can't see what counsel is pointing at. If it is very important I would suggest you staple it to the board. Counsel can do as he pleases.

Mr. Bell: Yes, your Honor, I think we should do that.

Q. Mr. Gothberg, would you come down so the jury can see. Now, did one of those beams go through here? A. No.

Q. Where did the beams go?

(Testimony of Victor F. Gothberg.)

A. Here's the beam.

Q. This is the beam? A. Yes.

Q. That is the beam that you charged him \$500 for?
A. That's right.

Q. Where is the beam that you charged him the other?

A. It don't show on the plan. That's on top of this end here to carry the end of the joists.

Q. Mr. Gothberg, didn't you just misunderstand the drawing—isn't that a beam right there?

A. No, this is the wall.

Q. But you put the beam in all right?

A. Oh, yes.

Q. You learned from the plan that the beam had to be in there, did you? A. No. [79]

Q. How did you learn that the beam had to be in there?

A. It was no plan drawn for that beam that holds the roof.

Q. Mr. Gothberg, all of this drawing was there at the First National Bank, and you and Mr. Cuddy and Mr. Burton E. Carr all went over these together, didn't you?

A. We did, yes—in Mr. Cuddy's office.

Q. That is the senior Mr. Cuddy? A. Yes.

Q. And there hasn't been any change in the plans—these papers—in any way, has there?

A. No.

Q. So you initialed this so that you could identify it? Where is your initials?

A. Right here.

(Testimony of Victor F. Gothberg.)

Q. And you put that on yourself?

A. I did, yes.

Q. What is that drawing right there?

A. The end of the iron beam.

Q. The end of the iron beam?

A. Yes.

Q. What is this fastened here?

A. This is fastened there.

Q. Fastened the beam to what?

A. To this beam. This beam was in before this was put in.

Q. This is the iron beam that went through here?

A. That's right.

Q. What is that beam?

A. That is the connection in at this end.

Q. What is this from here? What is this beam?

A. That's a wall here.

Q. And what is this, Mr. Gothberg?

A. That is one end on the beam.

Q. On this beam right here?

A. I believe that is.

Court: Pardon me, Mr. Bell, is that drawing in evidence?

Mr. Bell: Oh, I offer it in evidence.

Court: Is there objection?

Mr. Arnell: I see no reason to admit it, your Honor. It is identical with the one that is in except it doesn't bear Mr. Gothberg's initials. It is a duplication in the record of the exhibit.

Court: This one seems to me to be a bit clearer.

Mr. Arnell: I have no objection.

(Testimony of Victor F. Gothberg.)

Court: It may go in and if it seems there is an unnecessary duplication, one of them may be withdrawn. As long as the witness has testified to it I think it ought to be in evidence.

Q. Mr. Gothberg, when you were putting in the lift, did you have a set of plans and specifications that was furnished by the factory with the lift?

A. I had, yes. [81]

Q. Now, did you first have one and lose it, or allow—or it did get misplaced somewhere and Mr. Carr had to send and get another one outside?

A. No, I only had one.

Q. Wasn't there one sent for when you were about ready to install the lift? Didn't they have to get one by wire to Seattle?

A. Not that I know of because there was a plan with the hoist when it came.

Q. Now, do you know what kind of a hoist you put in? A. A two-plunger hoist.

Q. Do you know the name of it?

A. No, I don't remember the name.

Q. To refresh your memory, was it rotary?

A. No.

Q. It wasn't? A. No.

Q. I hand you a paper that has not yet been marked and ask you to state if you know what that is? A. That is a hoist.

Q. And is that the same hoist you put in there?

A. Probably not the same but it is similar to it. It was a two-plunger.

(Testimony of Victor F. Gothberg.)

Q. Look at it carefully and see if it's not exactly the one that you put in? [82]

A. I couldn't say. It was probably different but as far as installment, it would be exactly the same.

Q. Now that is called rotary right on the top of it, isn't it—rotary hoist? A. It does, yes.

Q. That is the one you installed?

A. That is right.

Q. And that is the one you contracted to install?

A. No, this is not the one.

Q. Well, now, look there—look at the rotary hoist and see if you can see any rotary hoist with one plunger. See if they don't all have two plungers.

A. There might be in this company—maybe they have it—but another company might have a one-plunger.

Mr. Bell: We offer this in evidence.

Mr. Arnell: May I ask a question, your Honor?

Court: Yes.

Redirect Examination

Q. (By Mr. Arnell): Do you know, Mr. Gothberg, whether this type of a hoist was actually installed?

A. That is the type that was installed, yes.

Q. But it is not the type that was supposed to be installed—in other words, a two-plunger hoist. Is that correct?

A. That is the one that is installed, yes—two-plunger, yes. [83]

Q. Now, at the time discussion was had regard-

(Testimony of Victor F. Gothberg.)

ing the type of hoist was there a discussion with reference to a two-plunger or only a one plunger hoist?

A. There was supposed to be one-plunger.

Q. And at the time that these discussions took place, did you understand that you were to install a rotary hoist or a hoist by the trade-name of rotary, or just a single-plunger hoist?

A. When I signed the contract, the understanding was that there was supposed to be only one plunger.

Mr. Arnell: We object to it, your Honor, upon the grounds that there has been no foundation laid for it.

Court: Objection is sustained at this time.

Mr. Bell: At this time, would you produce me the original demand for further compliance with the contract that was served on you?

Mr. Arnell: Here it is. You might not recognize it. I made a lot of notes.

Mr. Bell: If it's just pencil notes we can erase them, or if you won't object, I will use my copy. Would you like to compare it. I haven't got pencil notes on mine except I got a little note on on the day of service.

Mr. Arnell: Which one of these notices are you planning to use—you served two.

Mr. Bell: Only served one. [84]

Mr. Arnell: The one attached to the **complaint** is different than this one.

(Testimony of Victor F. Gothberg.)

Mr. Bell: It must be just a typographical error—I didn't mean it.

Recross Examination

Q. (By Mr. Bell): Mr. Gothberg, I hand you a notice of demand to meet the terms of contract. I will ask you to check down through that and state whether or not that was served on you by registered mail.

A. That was. I got one like that.

Q. You got it? A. Yes.

Mr. Bell: I offer it in evidence, your Honor.

Mr. Arnell: I think this is out of order, your Honor. This relates to the plaintiff's cross complaint and I would raise an objection upon that ground. It is beyond the scope of direct examination. It would be part of Mr. Carr's case. It is part of the cross complaint and I think this is improper at this time.

Court: What has counsel for defendant to say to that?

Mr. Bell: I don't think, your Honor, that it would be improper because he has testified to strict compliance with the exception of two or three things, and I want to examine him about this particular notice that was served on him by [85] registered mail and to have him called back after it is introduced in evidence would be a rather cumbersome way of doing it.

Court: Doesn't counsel think the way to approach it is to examine him on these various items

(Testimony of Victor F. Gothberg.)

as to whether or not certain things were not done that he had contracted to do?

Mr. Bell: That's what I want to do, your Honor.

Court: Cannot that be done without offering the written demand in evidence?

Mr. Bell: I would be glad to do it but I thought Mr. Arnell would immediately demand that I introduce it if I was going to ask the questions.

Court: In order to shorten—

Mr. Arnell: My only objection to it, your Honor, is that it contains other requests than those which might be included within the terms of the original contract. This is quite a voluminous notice and I think contains some thirty-five different items, not all of which have been testified to by this witness on his direct examination.

Court: The fact that not every item has been mentioned would not preclude its being introduced. I think in order to shorten the trial, although out of order, it may be admitted. Ladies and gentlemen of the jury, you understand this is a demand made by the defendant, Mr. Carr, upon the plaintiff in the action. Papers of this kind are sometimes considered as what is known in law as self-serving declarations. In other [86] words, if one man makes an unjust claim upon another, he can sit right down and write it all out and put it before the jury and say I demanded so and so and it might not be true. It is for you, of course, to determine whether this demand has any foundation or what the foundation is. Ordinarily it would not be ad-

(Testimony of Victor F. Gothberg.)

mitted at this time, but since there is a cross complaint I think possibly we would take it up now with a saving of time.

M. Arnell: May I make one request of the court then?

Court: Yes.

Mr. Arnell: That it be limited strictly to the items about which Mr. Gothberg has testified. There were a number of items, your Honor, that are strictly without any possibility of argument—matters that relate to the cross complaint and have to be brought out by Mr. Carr. As to the items about which Mr. Gothberg has testified, I have no objection to the court's ruling, but I think it would be going far afield now in this cross examination to bring in these various items relating to claimed damages for one reason or another.

Mr. Bell: I am introducing it to offset his statement that he had literally complied with the contract outside of two or three exceptions which he described.

Mr. Arnell: Apparently I haven't gotten my point across. There were three or four items that relate to damage resulting from breach of contract, or whatever else might be charged, and I think at this state those items have no materiality in [87] cross examination.

Court: We can take them up when we come to them then. The jury will understand this is a claim made by the defendant. It may be admitted and marked Defendant's Exhibit D and it may be con-

(Testimony of Victor F. Gothberg.)

sidered read or may be read. Without objection it may be considered as read and either counsel can refer to it at any time.

Recross Examination

Q. (By Mr. Bell): Mr. Gothberg, do you remember the date you received the original of which this is a copy through the mail?

A. In the spring sometime.

Q. About May 15th?

A. I couldn't state the date of it—but it was in the springtime.

Q. Was it in the month of May?

A. I wouldn't be sure about that.

Court: What year?

Mr. Gothberg: 1952.

Q. Now, Mr. Gothberg, after you received this, what did you do with it? What did you do with the original of this?

A. It's just out home. I didn't do anything with it—I just read it.

Q. Did you ever talk to Mr. Carr about it?

A. No, I didn't. [88]

Q. Did you ever talk to anybody about doing the things that he demanded done to comply with the contract? A. No.

Q. We will take them down the line. Did you or did you not contract to provide and furnish a bond guaranteeing the compliance with the terms of the contract? A. I did.

Q. Did you ever furnish it? A. No.

(Testimony of Victor F. Gothberg.)

Q. Now, did you contract and agree to hook up the lights on the 7600 pump?

A. I believe that was in the contract, yes.

Q. Did you ever do that?

A. I never did it but see—the electric had a contract for that—if they did it or not, I wouldn't know for sure.

Q. After you received this notice, did you go and see whether they did or not? A. No.

Q. So far as you know, then, it never was done?

A. So far as I know, I believe it was done—and a long time before—because they said they was through with the job and he never had any complaints—and the year after I got this letter—he never complained that it wasn't hooked up.

Q. You knew they were complaining when you got this notice, didn't you? [89]

A. Oh, yes, but that is a year after the job is finished. It can happen that there be some damage in this time because I believe it was working at the time the contract was finished.

Q. Then in the contract, were you required to install one globe and window light on the marquee?

A. I believe so, yes.

Q. Did you ever do it?

A. I never did it—it was the electric.

Q. Well, the electric people worked for you as a general contractor, didn't they?

A. That's right.

Q. It was your duty, under the contract, to see that the terms were met, wasn't it?

(Testimony of Victor F. Gothberg.)

A. That's right.

Q. Now what did you do about this—he states this: “You have failed to install a front window glass that is large enough to comply with the terms of the contract and the glass that you have placed in this opening is too small, and is subject to being broken by reason thereof, and presents an unsightly appearance. Please take this window out and install a proper glass, and put in the nickel plating on the outside and inside of the windows, and install window strips on inside.” Now, what did you do about that? [90]

A. I called the Alaska Glazing. They had a contract for all the glazing.

Q. Did you go down there to see what the condition of it was?

A. I did. I admit that—I will replace that.

Q. You never did do it—and this has been served on you months and months ago?

A. I made a statement to Mr. Carr that I will not do any more work on that building before I receive payment of \$15,000. That's why I didn't do it.

Q. And his answer was he didn't think he owed you anything—that you owed him—is that right?

A. The way it looked—but I got it in black and white.

Q. I will ask you what you did about this, Mr. Gothberg, Number 5: Install a proper shut-off valve below the concrete to prevent freezing on outside hydrant. Did you ever do that?

(Testimony of Victor F. Gothberg.)

A. No. For the same reason.

Q. But the contract provided for it, didn't it? And the specifications?

A. Yes, but for the same reason it wasn't done.

Q. Was there a pipe that came up there in some kind of a manner?

A. I am not sure if it came through the wall when it come up outside the ground.

Q. There was no proper cut-off so that the water could be [91] taken away?

A. Yes. I would like you to wait and ask about all the plumbing—also the electric—because they will be down here and they can answer more accurate about those questions.

Q. Well, you knew it should be done, didn't you?

A. I knew it.

Q. Did you ever look at that pipe that was put in there? A. Yes, many times.

Q. Would you say it was put in right?

A. That I really can't say.

Q. You couldn't say? A. No.

Q. Now, it didn't have any shut-off on it under the ground, did it?

A. That's what he claims.

Q. It is true, isn't it? A. I believe so.

Q. Thank you, Mr. Gothberg. Now, do you know whether it bursted or not and water was—

A. That I don't know. I never had any complaint about that pipe until this spring—almost a year and a half—and if there was trouble with that

(Testimony of Victor F. Gothberg.)

he should have notified me right off and it would have been fixed.

Q. You didn't fix any of these other things they notified you [92] about? A. Not now.

Q. Did the contract provide—and the specifications—to install and furnish outlet plates on electrical contacts?

A. That's right—and the reason they wasn't installed—the City Electrical—I called them up and there was a man down there two times to install them—and Mr. Carr said “leave them off and I will put them on myself because I'm going to get the wall painted.”

Court: Did you hear that statement made yourself? Did you hear the conversation?

Mr. Gothberg: No, but he told me to, your Honor?

Court: Who do you mean by “he”?

Mr. Gothberg: Mr. Carr.

Mr. Bell: Well, I move to strike what the electrical boys told him.

Court: Motion is denied.

Q. Mr. Carr told you to leave them off?

A. That's right.

Q. When did he tell you that?

A. It was two or three days before the job was completed.

Q. Well, that would be in February or March?

A. In February.

Q. And was there anybody present when he told you that? A. That I don't remember. [93]

(Testimony of Victor F. Gothberg.)

Q. Well, then your contract did call for solid brass cylinder locks in the front doors, didn't it?

A. That's right.

Q. And you didn't furnish them, did you?

A. I did.

Q. You furnished them?

A. I put in cylinder locks in there.

Q. Yes, but Mr. Carr had to go out to town and get them to get you to put them in after you had put in some other kinds of locks in, didn't he?

A. He wanted another kind—so it was up to him to get them and I would install them.

Q. Did you tell him you couldn't get solid brass locks?

A. No, I put in brass locks in there.

Q. A little light cylinder lock?

A. No, they are my regular—for outside doors.

Q. And then you charged him for the carpenter that changed them, didn't you? Their time was figured in this extra that you figured, wasn't it?

A. No.

Q. Who put the lock in, actually?

A. The carpenter.

Q. What carpenter?

A. I don't remember now. That I wouldn't remember anyway. One of my men put in that work for me. [94]

Q. Some carpenter put it in? Now these carpenters you had there—you charged Mr. Carr per hour for those people, didn't you?

A. I did, yes.

(Testimony of Victor F. Gothberg.)

Q. Now, Mr. Carr had to pay \$45.00 for those locks, did he not? A. That I don't know.

Q. You never did pay him back for the locks, did you? A. Certainly not.

Q. And you never allowed him credit for furnishing the locks? A. No, I didn't.

Q. But your plans and specifications did provide that you would furnish everything?

A. I did. I had locks in there and he wanted another kind.

Q. Well, he wanted front door locks, did he?

A. Those was front door locks I had in there.

Q. Now, did you install push plates and kick plates on the five doors? Did you install all that?

A. I don't think they called for five doors—and I promised I would install those when I get the payment.

Q. You refused to do it until you are paid—is that right?

A. Not full—but some partial payment.

Q. Now, you didn't put them on then, as I understand it? A. Right.

Q. And you did contract to put them on five doors, didn't you? [95] Your contract provides to install push plates and kick plates on five doors?

A. I don't remember how many doors there was—but there was some doors.

Q. Did you ever put a two-way swinging door between the show room and the shop?

A. That's extra—that is not in the contract.

Q. Well, doesn't the contract provide for a two-

(Testimony of Victor F. Gothberg.)

way swinging door between the—doesn't the specifications describe that?

A. It does—but it also makes a statement that it is not in the main contract.

Q. But the specifications there provide for it, doesn't it? A. It does, yes.

Q. And you didn't install a two-way swinging door at all, did you?

A. No. I did but on his account because it didn't belong to my contract.

Court: May I ask him a question? Why isn't it in your contract if it is in the specifications?

Mr. Gothberg: It states in the specifications, I believe, on page 1.

Court: Go ahead.

Q. I will ask you to show us those in just a little bit, Mr. Gothberg. Now, on that two-way swinging door—it was [96] supposed to have push plates and kick plates on it, too, was it not?

A. That I don't know.

Q. You don't remember?

A. No, and if it should be—then it would be extra.

Q. Even though the specifications called for it, you think you are entitled to extra?

A. I don't think there was kick plates on those doors.

Q. Now, did you have any trouble with the heating unit out there at the place?

A. Not that I know of.

Q. Did you ever install the heating units?

(Testimony of Victor F. Gothberg.)

A. Anchorage Installation installed those.

Q. Do you know whether they put the motor in one at all or not?

A. I believe there was one stolen—but he delivered another one over there.

Q. Didn't you, after you received this request from Mr. Carr to do these things—didn't you go out and see whether that heater would work or not?

A. No, I didn't—because in the first place he did not request me to go out there and do that work.

Q. I will ask you if Number 11 in this written notice does not request you: "You have neglected to finish installing one heating unit with motor."

A. Right.

Q. Why didn't you do it then?

A. At that time I believe there was a change there so he couldn't install it—so that was the agreement between him and Anchorage Installation—

Q. Now, you weren't there at the time?

A. Oh yes, I was there at the time.

Q. You heard the conversation? A. No.

Q. Well, then don't tell about it.

A. I heard some of it.

Q. Just tell what you heard when Mr. Carr was present.

A. The partition was changed—so it would be in the way for the doors—so it couldn't be installed in the place where it called for.

Q. Where were these motors fastened to?

A. Straps.

Q. To the ceiling? A. And pipes, yes.

(Testimony of Victor F. Gothberg.)

Q. Up at the top?

A. Yes, hanging there.

Q. How high is the ceiling beams that go across in there? A. Twelve feet.

Q. Then they couldn't install this one because it was in the way of what kind of a door? [98]

A. A six-eight door.

Q. There was five feet and four inches above the top of that door. How big were these heaters?

A. But this was supposed to hang inside.

Q. There is plenty of beams. You could have moved it right or left if it had been in the way of a door—you could have moved it a couple of feet, couldn't you?

A. No, because this was going to heat the rest-rooms at the same time.

Q. You didn't install the equipment then?

A. No.

Q. And that was provided in the specifications?

A. Yes.

Q. You didn't install the three additional thermostats in the show room as provided for in the contract and specifications, did you, Mr. Gothberg?

A. No, I did not.

Q. You didn't do that? A. No.

Q. That has never been done?

A. I believe that was an agreement between Mr. Carr and Anchorage Installation because I asked Anchorage Installation——

Q. You believe—tell what you know about it.

A. I asked him why they didn't install it—and

(Testimony of Victor F. Gothberg.)

he said we had [99] an agreement between I and Carr that we should have only one thermostat.

Q. You got the notice, though, and the request to do it, didn't you? A. Oh, yes.

Q. And then you didn't do it? A. No.

Q. Now, you also were requested, in Paragraph 13, to furnish and install two additional thermostats in the shop. Did you do that? A. No.

Q. Now, then, Number 14 of the demand: "Remove and reset door frames in lead according to terms of the contract." Did you do that?

A. They are set in lead.

Q. Did you do it? A. I did it, yes.

Q. When did you do that?

A. In the fall—when we put in the door.

Q. And you did it when the doors were put in?

A. Yes.

Q. Did you do it personally?

A. No, my men did it. They had orders to do it. I didn't see it—but they had orders to do it.

Q. Do you know how it could get out of there if that door had [100] lead on it—then it would still be there now, wouldn't it? A. I guess so.

Q. If it is not there now then, you are mistaken?

A. I am mistaken, yes.

Q. Now then, Number 15: "Finish building on the outside and inside by cutting off projecting wires used in the construction of the forms, and to finish the building inside and out in a workman-like manner." Did you ever do anything about that after you got this notice? A. No.

(Testimony of Victor F. Gothberg.)

Q. You knew that wasn't done, didn't you?

A. I know it.

Q. All right, Number 16: "Take out and refinish one section of the cement floor in show room which was frozen during construction and is defective in its present condition." What did you do about that?

A. Nothing, because I can't see any defects in any floor there.

Q. You can't see any defects in any floor there?

A. No.

Q. Did you check back to see whether it was defective or not?

A. I looked at it the same as he did.

Q. When did you look at it?

A. I just looked at it today. I saw it and I was there before [101] and seen it four or five times.

Q. It's painted over today, isn't it, to cover it up?

A. It was painted sometime ago.

Q. It has been painted since you were there before?

A. Right.

Q. It did freeze, didn't it, Mr. Gothberg?

A. You couldn't call it freeze. There was just a little draft come from the window to the floor and hit the floor—but it wasn't freezing so the concrete is hard.

Q. Number 17: "Do all work necessary to make the floor in the boiler room drain properly as the same is not drained in its present condition." Did you go down there and look at that?

A. I was.

(Testimony of Victor F. Gothberg.)

Q. Could you make that drain?

A. I didn't see any water there.

Q. You knew it had been mopped up, didn't you?

A. That I don't know.

Q. Did you put a level on it to see that it drains away from the drainage inside of it, too?

A. No, if I should do it Mr. Carr would have to pay for that because it was time and material job.

Q. It wasn't put in in a workmanlike manner if it ran away from the drain, was it?

A. That I don't know. [102]

Q. I see. Number 18: "Replace the blocks over rear windows in shop which were frozen in construction where mortar has fallen out and especially the blocks at the south end of the building." Did you go and see about that?

A. I looked, yes.

Q. Has the mortar fallen off?

A. Not that I can see.

Q. You will tell the jury it is a good job?

A. From the inside you can see some crack in the mortar and that is not the contractor's fault. He got a stove there and a pipe comes up by the wall—and the wall gets so hot it dried out the wall entirely.

Q. There are holes—and a man can stand inside and see the outside very clearly, can't he?

A. There is cracks. Yes.

Q. Now then, Mr. Gothberg, did the mortar freeze when these blocks were being laid?

A. No.

(Testimony of Victor F. Gothberg.)

Q. Did you furnish any kind of heating system for the men to use in laying those blocks?

A. Yes, we had a fire going there and heated water—and heated sand.

Q. Where did you get this fire going?

A. Right in the building.

Q. What kind of fire was it? [103]

A. Wood.

Q. What was it in?

A. I believe they had it right on the ground.

Q. In the center of the building?

A. Yes, for heating the water.

Q. Was that in the middle of this 50 by 100 foot building?

A. No, it was just about opposite of the twelve-foot door on the building.

Q. Opposite the side or back door?

A. Yes.

Q. Which door? A. The side door.

Q. And that comes in about the middle of the garage portion, does it?

A. No, a little further to the back.

Q. That is all the fire you furnished them?

A. That is all the fire there was, yes.

Q. Did they request you to furnish fire?

A. No.

Q. Did you have a carpenter working there at the time? A. Yes.

Q. Did they tell you the blocks were freezing and you had to have one of those blast furnaces going?

(Testimony of Victor F. Gothberg.)

A. I am a contractor. I wouldn't talk to the carpenters. I wouldn't argue with the carpenters about that—I never [104] talked to any carpenter about the masonry work.

Q. Did you ever talk to any carpenter about having heat where this work was going on?

A. No.

Q. You never did? A. No.

Q. Do you know this gentleman sitting back here? A. I know him.

Q. He worked for you a long time, didn't he?

A. He did.

Q. Did you ever talk to him about heat?

A. I don't remember. I am sure I didn't talk about the masonry with the carpenter.

Q. But you know there is a regular heating system where they put canvas over it and heat is blown into the place where the concrete is laid, don't you?

A. I know about that, yes.

Q. It was used at the hospital at the same time you were building there, wasn't it?

A. That I don't know.

Q. Did you have anything to do with the hospital? A. No.

Q. I beg your pardon, I thought you did. You did know there was an adequate method then to prevent the freezing of concrete? [105]

Mr. Arnell: I wish to interpose an objection. I think Mr. Bell has gone far afield. The witness testified he didn't use a certain method, whether he

(Testimony of Victor F. Gothberg.)

was working on the hospital or thirty other buildings—it is immaterial and this question merely pursues that same line of thought.

Court: Very well, you may answer. That is not to imply there was any freezing. Do you know if there is an adequate method to prevent freezing of concrete?

Mr. Gothberg: There is, yes.

Q. Did you know it then, Mr. Gothberg?

A. Oh, yes.

Q. And you didn't use it?

A. No, because it wasn't freezing. It wasn't that cold.

Q. How cold was it when those concrete blocks were being laid? A. That I can't state.

Q. Could you give us the approximate date?

A. I would have to look it up in the books. Otherwise I don't know.

Q. Was it in Demember at all?

A. Not in December.

Q. Well, was it in January?

A. In September and October.

Q. And you can't remember the date?

A. No. [106]

Q. All right. Now when you were down there today, did you check to see if the windows in the shop were loose?

A. I checked some and I couldn't find any loose.

Q. You couldn't find any loose up there?

A. No, I didn't check all but I checked a few—and they were all solid.

(Testimony of Victor F. Gothberg.)

Q. Could you see the light by looking around the windows? A. No.

Q. What is between the windows and the concrete wall?

A. Some is steel—and some is wood.

Q. Well, what is between the two to keep out the wind and all? Is there any insulation?

A. There is caulking compound.

Q. Did that stop the light from shining in when you were down there today? A. No.

Q. The light came right in?

A. The light comes right through the windows, of course.

Q. I mean from around the frame.

A. I couldn't see any light through there any place.

Q. Now, Number 20 in this demand states: "You are notified that the contract provides for one coat of red lead and two coats of aluminum on all steel and that no red lead was used, and only one coat of aluminum paint, therefore, you are notified to comply with the terms of the contract and [107] use the proper coats of paint." Did you do that?

A. That is done, yes.

Q. When was it done?

A. That was done—the red lead paint was put on in the factory—and two coats of paint was put on in the field.

Q. When was that done—about when?

A. I don't know when the first coat was put on but it was on when I came to that place—I don't

(Testimony of Victor F. Gothberg.)

know—probably it was on for ten years. I don't know when the steel was made up but the contract provide it should be done—that is charged to the one that buys the steel.

Q. Did you ever check to see if it was done?

A. I checked it and it was on.

Q. You will testify it was done, will you?

A. That I will.

Q. Did you ever see any red lead put on there?

A. No, because it was already on.

Q. Who put it on then?

A. The factory in Seattle—or wherever he got the steel.

Q. But the contract provided for one coat of red lead and two coats of aluminum. Did you ever put those on?

A. There was one coat of red paint on—and there were two coats of aluminum.

Q. You figure the people who put it on in the factory—that that would comply with the terms of the contract? [108]

A. No, it always comes with one coat of paint on.

Q. But you didn't put any red lead on or have any red lead put on? A. No.

Q. And you didn't have only one coat of aluminum paint put on?

A. There was two we put on. I asked the painter and he said he put on two.

Q. You knew that Mr. Carr objected to it at the time, and told you then that they weren't putting the red lead on, didn't you?

(Testimony of Victor F. Gothberg.)

A. I never heard a complaint until I got that letter a year and a half after the job was finished.

Q. Now, your contract provided that you would install the air compressor, didn't it?

A. Right.

Q. Now then, do you know whether or not Mr. Carr had to pay to assemble and reinstall the pipe in connection with the air compressor?

A. If he paid anything—I don't know.

Q. You do know that he did have somebody working on the air compressor there, didn't you?

A. Anchorage Installation.

Q. And he had to pay for it, didn't he?

A. Who? [109]

Q. Mr. Carr.

A. That I don't know because I believe I am charged for that from Anchorage Installation.

Q. You just believe you are charged with it?

A. I will have to check up on that?

Q. I see. Now, was your attention called to the fact that the shop floor was tremendously out of level?

A. There was two places—and it was fixed at the time—the day after it was poured—and after that I never heard any complaint before I received this letter.

Q. Mr. Carr objected strenuously to the way it was being put down, didn't he. Just put down by eye and nothing was used to keep it level?

A. They had a straight edge to level it off with.

Q. Just a straight edge laid over the concrete?

(Testimony of Victor F. Gothberg.)

A. Just a two-by-four like this.

Q. That is all you ever do?

A. That is all they ever do.

Q. Did you go back and look at it when the snow was melting off of the cars in there?

A. No.

Q. You did know that from walking over it you almost stumbled because it was so uneven.

A. I know it had two places that was hollow so they were filled in. [110]

Q. About how big were those hollows?

A. About a quarter of an inch.

Q. And you put a coat of stuff over that?

A. That's right.

Q. That's all you ever did to the floor?

A. Right.

Q. Now, you were supposed to put some floor drains in the garage, weren't you?

A. That's right.

Q. Did you look to see what they put in there?

A. Oh, yes.

Q. They broke right through the first car that got on them, didn't they?

A. I don't know anything until I got that letter a year and a half later.

Q. Did you go down there to see?

A. No, I never knew there was any damage on those—I never got any notice about it so I didn't know.

Q. Did you know it cost them \$37.50 to replace or put in proper covers for those drains?

(Testimony of Victor F. Gothberg.)

A. I didn't know it then. I knew it when I got that letter.

Q. Did you ever finish the walls in the men's restroom?

A. No, it don't call to finish it on the plan.

Q. Did you give Mr. Burton E. Carr credit for the cement blocks that you took away from there?

A. I did, yes.

Q. How much did you give him credit for?

A. I don't remember now how many there was—one place about eighty block—another place twenty-nine—something like that. I don't remember exactly but it's on the list there.

Q. When you got this notice from Mr. Carr to give you credit for those blocks, did you ever let anyone know that you would be willing to give credit for these blocks you had hauled away?

A. He had it on the bill. It was taken off on the bill already.

Q. You don't know whether those were mentioned on the bills or not, do you, that he got?

A. The blocks?

Q. Yes.

A. He mentioned in his letter, yes.

Q. Now, you did agree to install proper exhaust pipes with swivel of a manufactured and recognized product, according to the contract, didn't you?

A. That is installed according to the plans and specifications and the drawing.

Q. What did you put in there instead of the regular manufactured swivels?

(Testimony of Victor F. Gothberg.)

A. They don't call for any regular manufactured—read the specifications—that is installed exactly by the specifications— [112] I believe there was even a special drawing made for it.

Q. I will come back to it. You did try to charge him for the beams leading between the show room and the garage, didn't you, as extras?

A. Certainly, because that wasn't in the contract. I couldn't put that in for nothing.

Q. The specifications called for five doors and one two-way swinging door with kick plates and push plates on them, didn't they?

A. Read the specifications there and you will see that it don't.

Q. What did you think you were going to put in those openings shown on the plans?

A. At the time I didn't know what he was going to put in there because I didn't figure in any bid.

Q. You did add in these extras that Mr. Arnell showed you this morning—you did have those doors installing them?

A. Certainly. They were extra.

Q. That is part of the extras you are trying to collect for?

A. Yes.

Q. I see. Now, the doors out front—after you changed those locks were pretty badly hollowed out—weren't they broken up?

A. No, they are not broken up. I looked at them and they are [113] very good—in perfect condition even today.

(Testimony of Victor F. Gothberg.)

Q. When you take out one lock and put in a different kind of lock, it butchers it up?

A. Not necessarily.

Q. Did they have to plug up the holes?

A. That I don't know—I wasn't there.

Court: We will suspend now. Ladies and gentlemen of the jury, during the recess you will remember the admonitions of the court as to duty and the court will stand in recess for ten minutes.

Whereupon the court at 3:00 o'clock p.m. recessed until 3:10 o'clock p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Counsel may proceed with examination.

Q. Do you have the specifications there before you, Mr. Gothberg? A. No, I haven't.

Q. Now, would you please turn to Section 5—1. Do you have it there?

A. Section 5, page 1?

Q. Yes. That is Builders Hardware and Miscellaneous Metals. A. Right.

Q. I will ask you if on that page it doesn't say this: "Each inside door with the exception of the triple doors shall be [114] supplied with the following hardware." Do you see that there?

A. I see it.

Q. "One pair of 3½-inch butts, one latch set with cylinder lock, one kick plate." Do you see that there? A. I see that.

Q. And right under that: "The triple doors

(Testimony of Victor F. Gothberg.)

shall be supplied with the following hardware: Two folding doors, one—one-half pairs of 4-inch butts each door, one chain bolt each door, one foot bolt each door, one ball bearing coaster each door.” Do you see that there?

A. I see it.

Q. All right. “Swinging door”—right below that —“Two pivots with double acting checks, two push plates, two kick plates, one cylinder lock.” Do you have that there? A. I have.

Q. Now: “Metal clab door, two pair 4-inch butts, one latch set with cylinder lock, one door closer with necessary brackets.” Do you find that there?

A. I find it.

Q. Now, you didn’t put any of those in, did you?

A. Oh, yes.

Q. Were those the ones you charged extra for and testified about the extras this morning?

A. That’s only for the swinging door—that’s extra—and also [115] for the two other doors—that’s extra.

Q. They are all provided for there—why do you say you are entitled to sixteen hundred and some odd dollars for extras?

A. I said it states on the specifications here—in the front—how much I am supposed to do. If you go down to the specification on page SW-1: “This work shall include a concrete apron by the gas pumps but shall not include the wall board or finish carpentry on any interior partitions with the exception of the shower room and one rest room.”

(Testimony of Victor F. Gothberg.)

Q. Well, that doesn't say anything about the doors being exempt, does it?

A. That includes all the trim work—and all walls inside.

Q. The first original contract provides for a wall through there, doesn't it? And the specifications provide for a cinder block wall through there?

A. Right.

Q. You never did put the cinder wall in, did you?

A. No, I put the partition instead.

Q. That is what you charged extra for?

A. I didn't charge extra for that partition.

Q. What was that \$1600 and \$1300 you testified about this morning?

A. There is a lot of work in that place.

Q. You left one partition out and put another one in? [116]

A. Right.

Q. And you charged him for that partition?

A. I didn't charge him for that.

Q. What did you charge extra for?

A. For the balance of the partition, too—and furring out the walls in the show room—and putting in the ceiling in the show room.

Q. Putting in what?

A. The ceiling—and ceiling in the two offices there—and ceiling in the part where they stored the parts—in that room and partitions.

Q. The contract and specifications didn't provide for any kind of finishing in that building?

A. Not a thing.

Q. Just a naked wall?

A. Not a thing.

(Testimony of Victor F. Gothberg.)

Q. Where were these doors going to be? Were they to be stacked in the corner or to be hung?

A. At a later date—it was up to him—he could even have another fellow install them because it wasn't included in this contract. Exclude everything except the shower room and the restroom—that is all that was in my contract.

Q. Why did you sign and approve that specification to furnish those doors and to hang them?

Mr. Arnell: He signed them and why he signed them is not [117] material at all.

Court: I think that is right. It is a matter of argument to the jury if it is even arguable.

Q. When we had the recess I had just asked you about removing the old doors and furnishing the new. I believe you stated you didn't think that was necessary. A. Certainly not.

Q. All right now. No. 30: "Make proper repair and adjustment for failing to use heavy wire mesh in gas pump lanes as called for in the specifications." I believe you told Mr. Arnell you didn't use any mesh at all? A. I did.

Q. And you haven't done anything about it since either, have you?

A. There can't be anything done about it now except to take the floor up.

Q. Is there any cracks in——

A. There is not one crack in it.

Q. You looked that over carefully, did you?

A. Oh, yes.

Q. All right, but you didn't use the wire?

(Testimony of Victor F. Gothberg.)

A. No, because——

Q. Now, No. 31: "Eliminate from extras your charge for installing a hoist which was included in the contract." Now that installing of that hoist was included in the [118] contract, wasn't it?

A. Not that type of hoist.

Q. How much did you charge him for installing that hoist?

A. I believe it was 40% on the cost.

Q. And what was the cost of installing?

A. That I can't remember outright.

Q. You never installed mirrors in the restrooms, did you? A. I did—they are there.

Q. They were left sitting on the floor, weren't they?

A. Well, one—that had to be put up temporary so I asked the fellow where I should put it and he said just to leave it on the floor—and the other one—I hung that one.

Q. Did you hang it with a piece of wire?

A. No. We nailed it in and screwed it in—whatever it was—to the wall—solid.

Q. Now, you were asked in this sub-paragraph 34, to furnish an itemized statement of the payroll for the month of February, 1952, and to show what part of this payroll was extra and what part was in the finishing of the contract. Did you ever do that?

A. I believe Mr. Arnell got all that there.

Q. But you never did give it to Mr. Carr, did you? You never did furnish that payroll to him?

A. The way I understood it—was to come up in

(Testimony of Victor F. Gothberg.)

court. I wasn't supposed to deliver it to him. [119]

Q. You never showed him that payroll, did you, yet?

A. No, but it is there if you want it—you can have it.

Q. You didn't finish the contract on time because you were finishing it on the first of December, were you not?

A. Right, and it was—the contract calls for a monolithic pouring and as long as he did not come there with the hoist—so I could install those—it was delayed, so I couldn't put in the floor before I got the hoist.

Q. How long had the hoist been there before Christmas?

A. It wasn't there before Christmas. I believe it was in between Christmas and New Year's.

Q. You knew where the hoist was in town—it could be delivered any day?

A. I asked him many times—and I didn't get it. I didn't know whether it was in town or in Seattle.

Q. It was there over a month before you ever poured any concrete, wasn't it?

A. We started to install it the day after he brought the hoist over.

Q. Did you ever ask him for the hoist?

A. Oh, yes.

Q. Did you ask Mr. Carr for it?

A. I did, yes.

Q. When did you do that?

A. Quite a few times. [120]

(Testimony of Victor F. Gothberg.)

Q. Did you tell him that it was delaying anything?

A. Oh, yes. He knowed that just as well as I did.

Q. Do you know whether or not Mr. Carr had to pay \$175.00 to the Anchorage Installation Company for the connection of the pipe to the car washrack?

A. That I don't know—if he did it seems foolish to me because he was supposed to send the bill to me—regardless.

Q. But you never did pay it and he had to pay it?

A. Any bill that came to me—it's paid.

Q. Did you ever give him credit for that \$175.00 he had to pay?

A. I never did because I didn't know if he paid it.

Q. Mr. Gothberg, did you ever put the hand railing on the stairs that went down into the basement?

A. No, that was eliminated on account of the change in the shower room—so the wall goes all the way out there.

Q. Well, there should be a hand railing there, should there not?

A. There should be, yes.

Q. And you never did install one?

A. No, and if I did it would be extra because that wasn't in the contract—that was extra—for the digging and the basement—and the whole thing. It would be charged to Mr. Carr because it's not in the contract.

Q. If it was provided in the specifications, then, you should [121] have done it, should you?

A. Right.

(Testimony of Victor F. Gothberg.)

Q. And if it is in the specifications, then it is your fault, is it? A. Yes.

Mr. Bell: All right, that's all.

Court: Is there any redirect examination.

Redirect Examination

Q. (By Mr. Arnell): You have before you Defendant's Exhibit D. Mr. Bell has questioned you at some length now about these various defects. Had Mr. Carr ever, at any time prior to the service of this notice upon you, made known the so-called objections, if you recall?

A. Never anything—except the window.

Q. What window? Is that the front window?

A. Yes, that is the only thing he ever asked me about.

Q. Now, in regard to Item 2—charging you with failure to hook up the lights on the 7600 pump. Was the electricity run to the island where the pump was located?

A. It was, yes.

Q. To your knowledge, was the electricity hooked up to the pump itself?

A. It was as far as I know. I never heard anything about that until I got this letter a year and a half later. [122]

Q. The next item—No. 3: "One globe and window light. What kind of a globe would that be?"

A. That is a regular light bulb.

Q. 50 or 75-watt light bulb?

A. I could be a hundred. I believe a hundred.

(Testimony of Victor F. Gothberg.)

Q. To the best of your knowledge, was also the window light furnished there?

A. As far as I know—I would notice if it was out at the time—I believe it was there.

Q. There is none there now?

A. There is none there now.

Q. Now, was Mr. Carr out on the job site at the time you were doing the construction work on the marquee?

A. Oh yes, he was there every day. Not all the time, you know, but he was there almost every day.

Q. Did you discuss with him this additional charge of \$500 that is specified in Section 6 of this notice?

A. I never did discuss that particular deal because anything extra was to be charged—according to time and material. He knew it was put in, yes.

Q. Did he ever, prior to the time this notice is dated, make any objection to that \$500?

A. He never mentioned that.

Q. In item 21 on page 3 of this notice, Mr. Gothberg, there is reference to a beam. Mr. Bell didn't bring that out. [123] What beam does that refer to?

Mr. Bell: The reason I didn't do it—it had been gone over and over before and I didn't want to take the time.

A. That is the beam over there by the door—as I showed on the plan yesterday—and it had to be moved back twelve feet so the door opened all the way up—otherwise it would hit that beam—and wouldn't open all the way up.

(Testimony of Victor F. Gothberg.)

Q. Now, did you allow credit for all of the blocks that were not used as a result of the change in the installation of the door? A. I did.

Q. And the other changes?

A. It's right on the bill there.

Q. Now, Mr. Gothberg, according to your best estimate, how many man hours would it take to perform the necessary clean up work that might be required by your contract?

A. As it stands now—to finish the whole thing—it should take two or three days.

Q. How many men?

A. One man—that should be the most.

Q. Would that include what necessary work is required as a result of the shrinkage of the block?

A. It would include that, too.

Q. With respect to that shrinkage, would you explain again to the jury why that had occurred?

A. On account of too much heat. They installed a stove there and the stove goes right up against the wall—then it dries up all the moisture off the blocks so they shrink a little—and that is not the contractor's fault whatsoever—they can't help things like that.

Q. Now, Mr. Carr by this notice in Item 34, asks you for an itemized statement of your payroll for the month of February, 1952. Had he ever made such a demand upon you prior to May of 1952?

A. Never before I received this.

Court: Did you receive that letter or demand before or after the suit was started?

(Testimony of Victor F. Gothberg.)

Mr. Gothberg: That was after the suit was started.

Q. Mr. Gothberg, in regard to the ramp, some point was made of that—that no mesh was put in. Will you state why not?

A. Mr. Carr was supposed to furnish the mesh—and there was none left because it was all used in the floor—and there was no place in town where we could buy any.

Q. What did you do to compensate for the failure to use the mesh?

A. I mixed an extra half bag of cement in each yard of concrete.

Q. In other words, you tried to make a richer mix of concrete to compensate for the lack of mesh?

A. That's right. [125]

Mr. Arnell: No further questions.

Court: Any further cross examination?

Mr. Bell: I think not at this time.

Mr. Gothberg: There's one question—I wonder if I could make a statement?

Mr. Bell: Object to a voluntary statement.

Court: You better speak to your counsel.

Mr. Arnell: May I ask a question, your Honor?

Court: You may.

Q. This morning, Mr. Gothberg, you were asked regarding the installation of a pump and you stated you did not install it?

A. Right.

Q. Do you wish to clarify that statement?

A. Right. You see—this Anchorage Installation

(Testimony of Victor F. Gothberg.)

did that work. I didn't do it myself—but they did it on my account and I had to pay for it.

Q. When you answered this morning, you meant you did not personally install it?

A. That's what I meant. That I did not personally put it in.

Court: Did Anchorage Installation install it, if you know?

Mr. Gothberg: They did—and they moved it three times.

Court: Was that charged to you?

Mr. Gothberg: That was charged to me. [126]

Court: And did you pay it?

Mr. Gothberg: Yes.

Mr. Arnell: All right. No further questions.

Mr. Bell: Just one more thing—two or three questions.

Recross Examination

Q. (By Mr. Bell): This BCG 8 that I am referring to—what is that drawing of right there?

A. That is a hand rail.

Court: Is that in evidence, Mr. Bell.

Mr. Bell: The other one is in there possibly.

A. But the way this is extended out to the wall—there can't be any such thing at all. That eliminates this hand rail.

Q. You admit that the plan does show the hand railing—the railing? A. It does, yes.

Q. And you never did put the railing in?

A. No.

Q. Now I will ask you——

(Testimony of Victor F. Gothberg.)

A. There is no place to put it now—it can't be put in.

Q. I will ask you if this plan does not show that particular two-by-twelve—doesn't it show the steel beam that you are referring to—a large steel beam?

A. Yes, it shows right here.

Q. And this particular plan that you have before you, BCG 8, [127] does show that particular beam on it, doesn't it?

A. It does, yes.

Mr. Bell: That is all.

Redirect Examination

Q. (By Mr. Arnell): Mr. Gothberg, will you point out which beam you are talking about, please, for the benefit of the jury?

A. This beam that comes across here—from one side of the building to the other.

Court: Is that beam shown in there a part of the drawing?

Mr. Gothberg: No, but they called for on the specifications there—Mr. Carr would furnish that beam.

Q. Where is the second beam?

A. It goes on the top of this part—six feet higher up.

Q. Above the joists?

A. Yes. This is the cross picture.

Mr. Arnell: That's all.

Recross Examination

Q. (By Mr. Bell): Now, Mr. Gothberg, you made

(Testimony of Victor F. Gothberg.)

a statement I would like to clarify. You said the specifications provide that Mr. Carr would furnish that beam. Would you please show us in the specifications where he is to furnish it?

A. I read it before. I can read it again. On page SC-1—"Structural steel is on site but is not in place and consists [128] of so many pounds." They don't state pounds—it is blank.

Q. You said this morning you inspected that steel, didn't you? A. No.

Q. Well, you checked it?

A. No.

Q. You didn't say that this morning?

A. I was never at the site when I figured this plan—so when it says here I don't have to furnish steel—I wouldn't figure it in my estimate.

Q. Does it say that all additional supplies you will furnish—

Mr. Arnell: Your Honor—

Court: Objection sustained, if it is an objection.

Q. Does the specification provide that all additional material other than what's on the ground will be furnished by you?

Mr. Arnell: We interpose the same objection. The specifications speak for themselves.

Court: The witness can state if he knows whether there is any such provision.

A. There is in the back—but this is a special condition that overrules everything that's behind it. They govern the whole thing.

Q. Then you can't show us any exception to that

(Testimony of Victor F. Gothberg.)

statement that you agreed to furnish all additional material where it was needed? [129]

A. That's right.

Mr. Bell: I see. All right.

Court: Where is that provision about furnishing additional—

Mr. Gothberg: That is in the back someplace.

Court: Can you read it?

Mr. Gothberg: Right there. It says what's to be done—furnish all labor and material—but in that case they could claim I should pay for all the steel.

Mr. Bell: That is a voluntary statement of the witness and not responsive to the question.

Court: That is a matter of argument.

Mr. Bell: Object to that and ask that it may be stricken.

Court: It may be stricken. Counsel may argue it.

Mr. Arnell: What section of the specifications is that, your Honor?

Court: It is SW-1, apparently, and it reads in part as follows: "The work consists of furnishing all plant labor, equipment and materials and performing all work in strict accordance with these specifications and drawings, forming a part hereof, for completing the construction of the Nash Garage at the corner of Fifth Avenue and Denali Street in the City of Anchorage"—and there is further detail. The last paragraph on that page is as follows: "Additional finish work may be added to the contract from time to time." And then on the next page: [130] SC-1, which is "Conditions existent at

(Testimony of Victor F. Gothberg.)

time contract takes effect: A—Footings and Foundations, as well as boiler room walls are in place. B—Backfilling of existing concrete is complete. C—Structural steel is on site but is not in place and consists of blank pounds. D—The following number of pumice blocks are on site but not in place: (1) Approximately 3,250—8x8x16—standard. (2) Approximately 60—8x8x16 bullnose. (3) Approximately 90 — 8x8x8 — double bullnose. (4) Approximately 17 — 8x8x8 — single bullnose. (5) Approximately 90 — 8 x 8 x 16 — double bullnose. E—Insulation for roof construction in the quantity of 5,120 square feet is warehoused within the city limits. F—Approximately 4,500 feet of one-quarter inch pencil rod.”—Are pencil rods the rods which are put in the concrete to strengthen it?

Mr. Gothberg: No, to hold the forms together when we are pouring the concrete.

Court: And those rods—after the concrete is poured—are usually cut off?

Mr. Gothberg: Yes.

Court: Does counsel care to question the witness any further?

Mr. Bell: Nothing more on my part.

Court: You may step down. Another witness may be called on behalf of plaintiff.

Mr. Arnell: We have no other witness to call, your Honor. [131] Before I rest, I would like to make a request to the court for permission to file an amended complaint showing substantial performance. I think the phraseology of the existing

complaint is not perhaps complete enough to raise that point.

Mr. Bell: Your Honor, object to it at this late time. I don't think that he should be permitted to change the complaint in any way.

Court: Well, the changes that are requested, as I understand them, are merely to have the complaint conform to the proof so far as given, is that right?

Mr. Arnell: That is the purpose, your Honor.

Court: The objection is overruled and the complaint may be amended to conform with the proof given.

Mr. Bell: At this time I move to dismiss now as to Mrs. Marie Carr. There is no evidence that she had anything to do with it, and it is quite properly shown that she didn't sign the contract and had nothing whatever to do with it.

Court: Would counsel for plaintiff care to argue that?

Mr. Arnell: At this time, your Honor, we have no direct proof that she had any part or participation in this contract. However, we do not know, and probably won't know until the end of the case, whether or not she has any interest in the property involved—and that is the purpose of my objection to dismissal as to her at this time. We do not know whether Mr. Carr and Mrs. Carr have had any transfer of this property between themselves or Mr. Carr has any current interest in the property, or whether the contract has been transferred to his wife.

Court: If there is any such proof it will have to be offered in court and the court will pass upon it, but at the present moment, there is nothing to show Mrs. Carr has any interest whatever in this action. Therefore, minute order may be made dismissing the action as to the defendant, Marie Carr, by reason of lack of proof of her responsibility for anything connected with it.

Mr. Arnell: Mrs. Carr has signed this notice of demand along with Burton E. Carr.

Court: Well, the order of the court is set aside. If Mrs. Carr wants to make herself a party, I guess we can't stop her.

Mr. Bell: She was already made a party, your Honor, when that notice was filed. She was a defendant in this suit. She filed an answer in the case, too, but she was forced into it by being sued. She had a right to demand to know why they were suing her. I don't think that that should change your Honor's mind a bit.

Court: I will reserve decision for the present.

Mr. Bell: Now, at this time I move to dismiss the action as against Burton E. Carr for the reason that there is no showing of compliance with the contract. There is an admission that [133] he did not comply and then sued on the contract and there is an admission that he did not comply with it.

Court: The motion is denied.

Mr. Bell: Exception.

Court: Witness may be called on behalf of defendant. I will consider over the evening this

motion to dismiss as to Mrs. Carr. At any rate the decision is reserved for the present.

Mr. Bell: Call Burton E. Carr.

Whereupon

BURTON E. CARR

was called as a witness in his own behalf and after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): State your name, please.

A. Burton E. Carr.

Q. Are you the Burton E. Carr who signed the two contracts that have been introduced in evidence here? A. Yes, sir.

Q. And one of those was dated the 19th day of September, 1950, was it?

A. Yes.

Q. And the other one in May, I believe, of 1950?

A. Yes.

Q. Mr. Carr, at the time you made this contract with Mr. [134] Gothberg, had he been on the premises and observed the conditions there?

A. You mean after——

Q. At the time you signed the contract with him, had he examined everything there at the building?

A. Yes, I showed him all the steel—and we checked all the steel out from where I bought it—and that was all checked out—and I showed him where all the beams and everything was that we were furnishing.

(Testimony of Burton E. Carr.)

Q. Did you show him the foundation that was in at the time?

A. Yes.

Q. How long had this foundation been in, Mr. Carr?

A. Oh, well, I believe that foundation was in when he inspected it on the bid, because we had to have this foundation. The city made us move this foundation back before we went ahead with the building.

Q. Who had put this foundation in?

A. Breeden and Smith put the original foundation in—and that was about between six and seven feet deep.

Q. Between six and seven feet deep?

A. Yes.

Q. Did that go all away around at that depth?

A. Yes.

Q. Did you make it clear to Mr. Gothberg the depth of that foundation? [135]

A. Yes, I told him what the depth of it was.

Q. When he later entered into the contract to cut the foundation off and restore the foundation back where it should be, did he put the foundation in the same depth that the other foundation was in?

A. No, not the front part. I don't know about the back part but I know the front part wasn't. It was shallower by three feet. He was about two feet short and I asked him about it—and the engineer, too, asked him about it—and he said that was just as good footing as if it went all the way down--

(Testimony of Burton E. Carr.)

and after that the building cracked all the way to the top.

Q. How long was it, after he put the building in, that that front cracked?

A. Well, we had a little earthquake—a little tremble—and that cracked—I would say half an inch at the top—and it goes on down all the way through.

Q. How long was that after the front part of the building had been put in?

A. It cracked within a month—or less than that. I just noticed it all at once—but I imagine it just kept going.

Q. Who is this engineer that you refer to?

A. Lorn Anderson.

Q. How did you come to get in touch with Lorn Anderson?

A. Well, that is a long story.

Q. Well, did Mr. Gothberg have anything to do with it?

A. Yes, Mr. Gothberg recommended Lorn Anderson for the job. He said he was a good architect—and that he would do the job for me very reasonable.

Q. Then did you employ Mr. Anderson on the recommendation of Mr. Gothberg?

A. Well, there is a Mr. Anderson—and then there is a Mr. Smith in there, too, the two together—but Lorn Anderson was a registered engineer, and Mr. Smith—I don't know—but Smith did the most of the talking.

(Testimony of Burton E. Carr.)

Q. Now, how long had Mr. Gothberg and this engineer been friends, or did you find out?

A. I wouldn't know—the only thing Gothberg said—that he drew quite a few plans out at the base—that he was well satisfied with—and he recommended him very highly for drawing of plans at a reasonable price.

Q. How much did you pay this engineer to draw those plans?

A. It cost me \$2700—and my understanding was it would be between Five and Six Hundred Dollars—I paid for it.

Q. And when you got the bill, it was for \$2700?

A. Better than Twenty-Seven Hundred and some odd dollars.

Q. When did you pay that?

A. Right after they built it. I asked Mr. Gothberg is everything and all these plans complete—and he told me they were—and Gothberg said they was. I went to Smith [137] first and then I asked Mr. Gothberg—and he said he was satisfied with them. They was all complete and they wanted their money right then—because one wanted to go out to the States for a vacation—so I paid them.

Q. That was before the building was complete?

A. Yes, sir.

Q. Did you ever see that engineer on that building or around the building after the building started?

A. The only time I remember him being there—he came—he would come there—I went down

(Testimony of Burton E. Carr.)

there practically every day and in the evenings I would go down there when he was supposed to show up—and he wouldn't show up. Under the foundation—on the corner—I dug down and inspected it—and I found out what the trouble was and covered it back up.

Q. And then he claimed to you that he dug down there, did he?

A. Yes,—he couldn't have because it was all frozen when I dug down—and he didn't show up—and I put a marker on there—but it never was dug again in that one corner.

Q. Then you never did know of the engineer being anywhere about that building after he got his money?

A. No, I don't. I called him up a number of times over the telephone and he said he would go see about this and that. We wanted heat for the building—and he wouldn't furnish it—and I would get after him and we kept going [138] around and around, and couldn't get any place.

Q. Did you ever talk to Mr. Gothberg about furnishing heat when these blocks were being laid?

A. A number of times.

Q. What did he say?

A. It cost too much. He said he would guarantee the building—if anything happened to it he would replace it.

Q. What time of the year was it when he laid those blocks?

A. About twenty below zero—because when they

(Testimony of Burton E. Carr.)

were putting the blocks on it was frozen—and they would slap this mud—they call it—on, and it would freeze solid—and they would have to take a chisel and chisel it off. Mr. Gothberg claimed when that thaws out in the summer it will set and be all right—but it was just sand and cement. And they put a lot of stuff in there that was supposed to heat it up a certain amount—but it didn't help because even the mud they was mixing would freeze. They had a few sitting there that was frozen solid. They would mix one—and use it—and mix another—and the second one would be frozen before it could be used.

Q. Did they ever use a heater or canvas to protect them in any way? A. No, they never did.

Q. Do you know whether or not one of the men that was employed by him cautioned him against that—that it wouldn't [139] be any good?

A. Quite a few men quit—and other guys had to complete the work.

Q. Do you know whether or not he ever talked to him, in your presence, about getting heat for these blocks?

A. No. I asked them how they could work in that cold and they said they can't.

Q. He testified about a fire. Would you describe that fire?

A. Pieces of two-by-four—pieces of old scrap lumber—that's all it was.

Q. Where was the fire built?

A. In the center of the building?

Q. How big is the building? A. 50 by 100.

(Testimony of Burton E. Carr.)

Q. And that is the only fire you saw there at any time? A. The only one.

Q. What about the freezing of the floor—in the office or show room part?

A. Well, part of it he replaced—around the doors—but then around the windows—we were figuring on putting tiling in there—but it was so rough I was afraid the tile wouldn't hold so I just painted it. I don't know how many coats of paint—and it is still not nice looking as it should be—I really wanted tile.

Q. Did some of the concrete floor in the show room freeze? [140]

A. Yes, it's still frozen—you can see it around the windows there.

Q. What about this big iron beam that he has referred to? Did he ever mention to you that that was extra until—

A. No, he never did. I didn't know it until I received the bill.

Q. What date was it that you received the bill?

A. He marked it on that envelope. He handed it to my wife as she was going out the door—and Mr. Gothberg brought the bills—and in his presence I marked on it "March 4th" that he give it to her—so she asked him why didn't he bring it in before, Mr. Gothberg, and he said it was down at the First National Bank. Well, we should have had it—not the First National Bank.

Court: March 4th?

Mr. Carr: March 4th.

(Testimony of Burton E. Carr.)

Mr. Arnell: What year was that?

Mr. Carr: That was this year—1952. He came in about four days after we sold out.

Q. Is this the envelope you are referring to, Mr. Carr?

A. Yes, that is the envelope right here.

Q. What date is marked on that?

A. March the 4th, 1952.

Q. Was that the date that you got the statement?
A. Yes, that's the date. [141]

Court: We will stand in recess for 10 minutes. The jurors will remember the admonitions of the Court as to duty.

Thereupon the court at 4:00 o'clock p.m. recessed until 4:12 o'clock p.m., at which time the following proceedings were had:

Miss Wise: I wanted to know what is the difference between the specifications and the contract. What's the technical difference? Can you define them? What's the difference between them?

Court: As I understand it—the specifications, once they are agreed to, are part of the contract. We will say that someone is to put up a building—then all of the structural details are put out in plans. I hope counsel will correct me if I go wrong. But when a contract is made to do a piece of work like constructing a building, it is not feasible to put the whole thing in the main contract, which designates the location of the building, and the amount of money that is to be paid for it, and so on. So the contract is made up and signed—and it

(Testimony of Burton E. Carr.)

contains the provision that the work will be performed and the job done according to the plans and specifications. Now, the plans and specifications are all made up beforehand, and all of the parties know about that. There is a drawing of the building, and then drawings are mimeographed in a fashion that we call blueprints, and they are the plans showing detail of the structure and all other details of [142] construction. The figures are put in another batch of papers, called the specifications, and the specifications tell how many doors are to be put in, how many ceilings, how many door knobs, how many kick plates, and so on. All of the details are put in the specifications. Thus the plans and specifications are made up in advance and frequently submitted to a number of contractors—and the contractors bid upon them and the one that gets the lowest bid is awarded the contract. But the specifications, when the contract is signed, are just as much part of the contract as though written in the main contract itself, although the specifications may not be signed by the parties. In this case the plans were initialed by the parties, so as to identify them, and I haven't looked at the specifications in this case to know whether the specifications are signed by the parties or initialed or not. Maybe counsel can tell me.

Mr. Arnell: I don't think they are.

Court: Both of the parties are bound by the specifications. They are obliged to conform to the specifications and to the plans unless the parties

(Testimony of Burton E. Carr.)

themselves modify them later. There is nothing to prevent the parties, after the contract is signed and specifications made up and so on—there is nothing to prevent the parties from making changes. Frequently, a person having a building or something else constructed will want something else done more elaborate, or less elaborate, [143] and, if agreed to, it may become part of the specifications, although not written in the specifications. Do you think that answers your question sufficiently? Has counsel any criticism to make of this?

Mr. Bell: Your Honor, I think your explanation was clear and good.

Court: Thank you. All right, the jury are all present. Counsel may proceed with examination.

Q. Mr. Carr, I hand you a check on the First National Bank, dated November 16th, 1950, and ask you to state if you know what that is?

A. That is \$175.98, made out to Anchorage Installation.

Q. Was that paid by you?

A. That was paid by me.

Q. What was that for?

A. Well, that was to install the washmobile—it says in the contract—so when they installed the pipes, the contractor never noticed what size pipes to put in for the washmobile, so I naturally couldn't use it—and so I was opening up for business in the next few days—so I asked Mr. Gothberg about it and he said he wouldn't do any more about it—so then I had the Anchorage Installation come in

(Testimony of Burton E. Carr.)

to make that change—and so he said o.k.—that they will change it the way it's supposed to be—so they took all the pipes out so I couldn't use it at all—then they come in with a piece [144] of paper for me to sign—for me to agree to pay for it—so I had to pay for it to go in business.

Q. Was that covered in the contract with Mr. Gothberg? A. Yes.

Q. Did the check clear through the bank and clear to them? A. Yes.

Q. Is the check in the same condition it was when you received it back from the bank?

A. The same thing, yes.

Mr. Bell: We offer it in evidence.

Court: This check is payable to Anchorage Installation?

Mr. Carr: Anchorage Installation, yes.

Court: Is there objection?

Mr. Arnell: No objection, your Honor.

Court: It may be admitted and marked Defendant's Exhibit E. How much is it?

Clerk: \$175.98.

Mr. Bell then read Defendant's Exhibit E to the jury.

Q. I hand you a statement here and ask you to state if that was given to you? A. Yes.

Q. By whom? A. By Mr. Gothberg.

Q. And is that in the same condition that it was when you received it, other than the one notation on the bottom? [145]

A. It is the same thing—except the one notation

(Testimony of Burton E. Carr.)

we noted it on the bottom there—so we could keep record of it.

Q. Other than that, it is in the same condition that it was? A. Yes.

Q. Now, I hand you a check dated November 28, 1950, and ask you to state if you know what that is?

A. Yes, that goes with this bill here—it is paid.

Q. And is that a check paying that particular bill?

A. It is paying a portion—of the 30% of the garage contract that we got from Mr. Gothberg.

Q. Well, is that check in payment of the statement there? A. Yes.

Court: Are the amounts the same?

Mr. Carr: Yes,—\$11,535.00.

Mr. Bell: We now offer the two and will ask that they be pinned together and kept together for the convenience of the attorneys and the jury. We offer the statement and the check in evidence.

Mr. Arnell: No objection.

Court: Without objection, they are admitted as one exhibit. They may be stapled together and marked Defendant's Exhibit F and may be read to the jury.

Mr. Bell then read Defendant's Exhibit F to the jury.

Q. Do you know, Mr. Carr, whether there was one check issued and Mr. Gothberg lost it or something of that kind? [146]

A. That is right. We give it to Mr. Gothberg

(Testimony of Burton E. Carr.)

and he lost the check—so he asked for another check—so we give him another check.

Q. Have you ever seen the last check yet?

A. No, I haven't.

Q. That was cashed through the First National Bank?

A. I don't know where it was cashed at—but the First National Bank is where the check was made on.

Q. And it was paid and charged to your account?

A. Oh, yes.

Q. I hand you another statement from Gothberg Construction Company and ask you to state if you know what that is?

A. Well, I am glad I seen that. That is some extra work that we paid Mr. Gothberg on this here sign that he mentioned we hadn't paid him. It's marked paid by check. That is \$12,756.07.

Q. Now, after you received that statement, did you cause to be issued your check on the new building account, and deliver it to Mr. Gothberg?

A. We delivered this check to Mr. Gothberg—either he came in after it or we mailed it—I don't remember exactly.

Q. Was it paid through the bank and charged to your account? A. Yes.

Q. Is the check in the same condition that it was, except for the words "paid 1-13/51" on the bottom? [147]

A. Yes, but this sign post is included in this

(Testimony of Burton E. Carr.)

check. I believe it is marked in in another place, too. This is for the sign and all that.

Q. That is one of the issues in the statement?

A. Yes.

Mr. Bell: We offer both the statement and check as one exhibit.

Mr. Arnell: No objection.

Court: Without objection, the papers will be admitted in evidence. The check and the statement may be entered as one exhibit and marked Defendant's Exhibit G, and may be read to the jury.

Mr. Bell then read Defendant's Exhibit G to the jury.

Mr. Kurtz: May I ask what the date of that statement is?

Mr. Bell: The date is 1-1-50, but I am confident that it is Mr. Gothberg's innocent mistake—that it should be January 1st, 1950.

Mr. Arnell: It should be.

Court: I think we will suspend now. Another matter has been set for trial this evening. You may step down, Mr. Carr. Ladies and gentlemen of the jury, the trial will be continued until tomorrow morning at 10:00 o'clock, and you will remember the admonitions of the Court as to your duty. You may retire.

Whereupon at 4:30 o'clock, p.m., September 23, 1952, the trial of the above entitled cause was continued until 10:00 [148] o'clock a.m., September 24, 1952.

Be It Further Remembered, that at 10:00 o'clock,

(Testimony of Burton E. Carr.)

a.m., September 24, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Mr. Carr was testifying when we closed yesterday. He may resume the stand and counsel for defendant may proceed with examination.

Q. Mr. Carr, at the close of court yesterday afternoon, you were examining checks and statements, and I hand you another that has not been handed to you before—and will ask you to state if you know what that is.

A. That is a check—let's see—I'll have to get my glasses. I'm getting old, I guess. That is the check for \$10,381.50—that's 90% of the work paid for—90% completion of the work which leaves only 10% left.

Q. Is that statement in the same condition that it was when it was furnished you outside of the—

A. Outside of where we marked it paid—and we have a paid receipt—a check from Mr. Gothberg—signed.

Q. And other than that—the check and receipt are exactly as they were? [149]

A. That's right.

Q. Who gave you the statement?

A. Mr. Gothberg.

(Testimony of Burton E. Carr.)

Q. I notice that Nash Sales and Service is the heading on the statement. Were you the owner of Nash Sales and Service? A. Yes.

Q. Was that the only building that you had building at that time?

A. That is the only one.

Q. The only one that was being built?

A. Yes.

Q. And that is on the same account that Mr. Gothberg has testified about?

A. That's right.

Q. When did he leave the job down there?

A. Well, that would be pretty hard to say. It was—I just don't remember right offhand.

Q. When did you move into the place?

A. We moved in—it wasn't completed when we moved in because we couldn't use the big doors. We moved in there the 15th—we had to move in there because we had no place to go. My lease was expired where I had before—and we had no place to live—so we had to move in there temporarily. He didn't even have doors on it. [150]

Q. What date was that that you moved in?

A. It was on the 15th—February the 15th—because we took the last load from the place—that is the reason I remember it.

Q. And the work continued on during the remainder of February, to some extent at least?

A. Oh, yes.

Q. Was there some doors to be hung at the time you moved in?

(Testimony of Burton E. Carr.)

A. He didn't even have the big door hung when we moved in there.

Q. But he did hang that soon, did he?

A. Yes. Of course, we had to work it manually. He didn't have the electric on it.

Q. I hand you another check, dated February 24, 1951, and ask you to state if you know what that is?

A. Well, that is made to Anchorage Installation Company for \$285.92—on the building. It's Anchorage Installation and they have charged us for it—and there is some extra work that they performed there. I don't know exactly what it was—but my wife—she had power of attorney for signing checks—and the bill was mailed to her. I never could find out—Anchorage Installation wouldn't tell me what it was for—and she already paid the check—and I didn't know it.

Q. Does she have power of attorney to sign your name to checks? [151]

A. Oh, yes.

Q. If her name appears on the checks here—

A. Or on papers—that's all the same.

Q. But the contract wasn't signed by her—she had nothing to do with the agreement in any way?

A. No. This is a building agreement.

Mr. Bell: We now offer in evidence this check.

Mr. Arnell: May I ask him a question, your Honor?

Court: Yes.

(Testimony of Burton E. Carr.)

Cross Examination

Q. (By Mr. Arnell): Mr. Carr, did you say this was for extra work that you ordered?

A. I don't know exactly what it was. We got the bill—and she went ahead and paid it—and she usually always pays bills right when they come in—and she went ahead and paid it and I got it afterwards, but I could never get a statement exactly what that was for from Anchorage Installation.

Q. Do you claim this as an offset against any money you might owe Mr. Gothberg?

A. Yes, that's what I believe it is.

Q. You believe it is—do you know?

A. Well, there's nothing else there that we bought, except on that month there was a tank for our residence—on that one month—and I know the tank was there—but this was [152] another bill. No, I couldn't tell you what that is for. It has something to do with the building—but she went ahead and paid it without me looking at the bills.

Mr. Arnell: If your Honor please, we would object to the proffered exhibit on the grounds that the evidence is not competent. Mr. Carr can't properly identify the work. He doesn't know what it is for, other than it is something in connection with the building. There is no showing as to whose obligation it would be.

Mr. Bell: May I ask a question or two, before you rule on that?

Court: Yes.

(Testimony of Burton E. Carr.)

Redirect Examination

Q. (By Mr. Bell): Mr. Carr, who was Anchorage Installation doing work for around your building there—you or Mr. Gothberg?

A. Mr. Gothberg had the contract—but Anchorage Installation was doing the work—and so I know definitely it is some work. I know it was work on the building but the only thing we bought that month from Anchorage Installation was a hot water tank for our residence.

Q. Was that included in this check?

A. No, it was not included—two separate bills.

Q. Now, did you order them to do any special work around the building for you during that time in any way? [153]

A. Yes, there was some special work that was done—but that was supposed to have been charged to Mr. Gothberg—and then we paid Mr. Gothberg for the extra work.

Q. Was it extra—outside of the contract and specifications—or was it work that was done that Mr. Gothberg contracted and agreed to do?

A. It could be one way or the other—but it is on the building—until we find out definitely what is on—it's on the building—and there wouldn't be that much work that I would authorize that much money for myself because when—I believe it is—you see when they put the—the Anchorage Installation Company—they put all this plumbing in or they started to put it in—and they hooked it up to the main sewer—I mean to the front. I told

(Testimony of Burton E. Carr.)

the men—I said there was no sewer in the front—it's in an alley—and they said it was their contract, and they were doing it, so I just kept out of it because I knew they were doing it wrong. After I told them it was wrong—so after they got all the sewer lines and everything in—then they decided it was the wrong way so they had to tear up all the sewer—all the way through the building—drain and everything—and change it around. I believe that's what that is but it wasn't my fault.

Q. Are you responsible for any of that extra work? A. No. [154]

Q. I notice a little notation on the end of the check that I hadn't noticed before. Would you read that. Maybe that might cast some light on the matter.

A. Well, it's got on here, "Extra work installing air lines and enlarging sewer to washrack"—but that enlarging the sewer and washrack—I know Mr. Gothberg has got that charged to us.

Q. Did you hear him testify yesterday that he furnished and paid for connections to the washrack? A. Yes.

Q. And now that you notice that notation on there—does that refresh your memory as to what it was paid for?

A. Yes, that's what it was—part of this here sewer deal that was changed around—and then on the washrack—we increased the drain and made it larger—and that's what that was for but Mr. Gothberg has us charged for that.

(Testimony of Burton E. Carr.)

Q. And were the drains, as put in by Mr. Gothberg, sufficient to take care of the water from the rack? A. No.

Q. And they had to be increased?

A. That's just that one.

Mr. Bell: Now, we reoffer it in evidence.

Mr. Arnell: May I ask another question, your Honor?

Court: Yes. [155]

Recross Examination

Q. (By Mr. Arnell): Mr. Carr, who wrote on this pencil notation—"extra work"?

A. That would only be one person—myself or my wife, but I didn't write it on there—so evidently my wife wrote it on there.

Q. Do you know what was done?

A. I couldn't tell you.

Q. There is also on this check the abbreviation for building, and a question mark. Who put that on?

A. I didn't do that. I know it was on the building—but I don't know what part—it was on the building but it was nothing that we ordered. It wouldn't amount to that much—what we ordered extra.

Q. Do you have a check which you issued in payment of that work you had done on your home?

A. Oh, no, that was a tank that we bought one month—but that was separate from the building.

Q. Did you pay it separately? A. Yes.

(Testimony of Burton E. Carr.)

Q. Do you have the check?

A. No, I don't—if there is any dope on that in there—the only thing I don't know—when I have it home.

Q. Would there be a possibility that the work was included in this work, also?

A. No, because that was separate. [156]

Q. How do you know?

A. Because we always make our checks separately from the building account and the business account. We have two accounts.

Q. Are you able, Mr. Carr, to positively inform the jury what work this check represents payment for?

A. Just what it says on the end of the check. That's the only way.

Q. You don't know when that was put on?

A. I don't remember seeing it on there when she paid the bill—and I think it was put on there afterwards—after the bill was paid—to identify it.

Mr. Arnell: We wish to renew our objection, your Honor.

Court: The objection must be sustained at this time. It may be marked for identification. Is Mrs. Carr in Anchorage so that she can be brought here to testify, if necessary?

Mr. Carr: Yes, she is.

Court: It may be marked for identification at this time and it will not be admitted until we know more about it.

Mr. Bell: Mrs. Carr is not well and I didn't

(Testimony of Burton E. Carr.)

want to put her on the witness stand unless it was necessary. She is not so ill that she is confined to the hospital or anything like that.

Court: Could her deposition be taken?

Mr. Bell: We can bring her here, but I was trying to [157] avoid using her if I could. Maybe the Anchorage Installation people would know.

Mr. Carr: Is there an invoice number on that check?

Mr. Bell: No.

Mr. Carr: Well, I believe it would be the best idea to find out what that check is for from Anchorage Installation. I couldn't find out what it was for when I tried—but maybe Mr. Gothberg can bring the bill for that and see what that's for on that date.

Court: It may be marked for identification as Defendant's Exhibit I, but will not be admitted at this time.

Q. Mr. Carr, I hand you a slip of paper marked "rotary" and ask you to state to the jury if you know what that is?

A. That is a rotary hoist—and when this contract was being made out—I mean for equipment and all——

Mr. Arnell: If your Honor please, we object. I think Mr. Bell should ask questions rather than have the witness volunteer.

Mr. Bell: I asked him what it was.

Mr. Arnell: And he stated—and that does not call for explanation.

(Testimony of Burton E. Carr.)

Court: Another question may be asked.

Q. All right, Mr. Carr, is that picture on the front of that paper the hoist that you put in your garage?

Mr. Arnell: Object to the question, your Honor, upon the [158] ground that it is leading.

Court: That is true, but the objection is overruled. That is the easiest way to get at it. He can say no or yes.

A. Yes, it is.

Q. Now, in the specifications, it was called to our attention yesterday by Mr. Gothberg, that a rotary hoist is one with only one check or plunger. What is a rotary hoist?

A. Rotary is the name of a hoist—and that is one that if the hoist drops down—you can lift one cylinder down—and the other one up. I give him blueprints before we made out the contract and showed him all our equipment to be put in the building.

Q. Did you ever buy for that building any hoist except a two-plunger hoist?

A. No—in fact, I had it already ordered and all the equipment.

Q. Was the hoist already ordered before Mr. Carr signed the contract? A. Yes, it was.

Q. You heard the testimony—he had to wait a long time for the hoist. Would you tell the jury what the facts were about that hoist? Did he ever have to wait for it at all?

A. No, he didn't—because I was talking to Mr.

(Testimony of Burton E. Carr.)

Anderson, the architect, Anderson, and I guess—I wanted him to go ahead in the building so that we would be able to get that stuff [159] in there. I told him then, I says “there’s \$25 a day on that building.” “Well,” he said, “you can’t stick me for that.” I said, “Why haven’t you got heat in the building?” and he says that it doesn’t make any difference for equipment in the building. He knew where it could be picked up—it was *excessible*. It was in Anchorage and he wasn’t ready for the hoist because the ground was all frozen—so I told him I would have it down there—that was on a Friday or Saturday—so I had it done Monday morning—and I had it on the frozen ground. It was all frozen solid for two or three feet—and I left it all right there and I told Mr. Gothberg he would have to be responsible for it.

Q. How long did it lay there in the building before it was actually installed?

Q. Quite some time because they had to close the building in first—and after they closed the building in, then the electricians put in plugs—just enough so they could get around. Then they put up a heating plant and got heat in there from the furnace. It was approximately three weeks before the ground was thawed enough to install the hoist.

Q. Did you ever, at any time, tell Mr. Gothberg that that was a one-plunger hoist instead of two?

A. No, I give him a picture of it—and the specifications—before the contract was signed. [160]

(Testimony of Burton E. Carr.)

Q. Do you know what happened to the first set of plans and specifications for the hoist?

A. He had those—Bjornstad & Clark—where I bought the hoist from—I had them wire to Seattle to get another plan—so we could install the hoist—and we got the plans and they were in there in plenty of time before he needed them because the ground wasn't thawed out enough. He didn't have heat in the building.

Q. Did you at all times have your equipment for him ahead of time before he was ready to use it?

A. Oh, yes.

Q. Do you know of any time that you ever in any way did anything, or neglected to do anything, that delayed you in getting into the building?

A. No, I didn't, because I had everything there.

Q. Now, you heard him testify that you told him to waive the using of that wire mesh in the driveway around the pumps or the island around there. Did you ever tell him that—not to use it?

A. I wouldn't be that foolish—not to use it because that's where all the strength is.

Q. Did you ever tell him anything like that?

A. No.

Q. Did you at any time agree to furnish the wire mesh?

A. No, that was in the contract. We had all the stuff [161] furnished that was on the premises—and he was to furnish all the labor and material—it says right in the contract.

(Testimony of Burton E. Carr.)

Q. Did you ever, at any time, orally or in writing, agree to furnish him that wire mesh?

A. Absolutely not.

Q. Did you ever, orally or in writing, waive the necessity of using wire mesh?

A. Absolutely not.

Q. He testified that he put a sack of cement in the mixture that was used around these pumps in lieu of the wire mesh. Did you ever know anything about any such thing?

A. I never heard of anything that foolish.

Court: Just answer the question.

Q. Did you ever hear that mentioned before he testified to it? A. No, I never did.

Q. Mr. Carr, did you tell him to change—what do you call this thing over the beam?

A. Marquee.

Q. Marquee. Did you ever make any changes whatsoever in that marquee yourself?

A. No.

Q. Did you hear him testify about the architect telling him to change that little angle wall back of the marquee, by putting in three cement columns there, instead of cinder blocks? Did you know that that was done by the engineer? [162]

A. Well, yes, in a way. I'll tell you. That was exchanged there. It called there for three doors in the front—and that is the way the building called for—and we had a change there—but I was going to let the building go up as it was—and he let all the blocks freeze and there was like a corkscrew

(Testimony of Burton E. Carr.)

in the top—you could push that in with your fingers. After they set for quite awhile, I told him I wanted them taken out—and he said no—he would take them out in the spring, and I said no, I wanted them taken out now—but you could push them out with your fingers. I said, “As long as you are going to take them out, anyway, put windows in there. We will pay for the windows in the front—” and he took all the blocks down.

Q. Did you ever know what happened to those blocks taken out by him until you heard him testify yesterday that he took them away?

A. He hauled them away.

Q. You knew that? A. Yes.

Q. Did you ever ask this architect, or engineer, as he calls himself, to make any changes, or to give any orders in writing to Mr. Gothberg about changes on that building?

A. I didn't get any notice on the changes except the ones that we changed—the front of the building—and took out the blocks which had to be removed, anyway, and we put in [163] glass in place of it.

Q. Did you know that the engineer had given him any orders to do that in any way?

A. No, I believe that I talked to Mr. Gothberg—I told him how I wanted it done—and I went up to Anderson and told him I wanted this here changed—and I believe that he changed it. That is the way it was changed.

Q. I hand you Plaintiff's Exhibit 7, signed by

(Testimony of Burton E. Carr.)

Mr. Lorn E. Anderson, and ask you to state if you ever saw that letter before it was introduced in court here?

A. Well, I never seen the letter before—but some of those is correct and some of it isn't.

Q. Did you ask Mr. Anderson to write any such letter? A. No, I didn't.

Q. Do you know whether or not you saw Mr. Anderson during the month of December, 1950?

A. No. I'll tell you—this letter—I don't know—I can't figure about that letter on December 28th. Well, it could have been—but it could have been before—I talked with Anderson about some changes which is on here—except there is one here—install overhead door in the back. That was o.k.—that was extra work, and door in the northeast wall—install four-by-six—and this Item B—that was extra work this way. Then he put in these blocks in there and they were all frozen and had to be taken out anyway—and we [164] decided to put a plate glass window, which plate glass window, I believe, **was** cheaper than the blocks, and Item C, install a two-foot, six-inch by five-foot, six-inch reinforced slab over boiler room. That is not right there. That was in the contract. I can show you that contract where Mr. Gothberg initialed that deal there on the contract—I mean on the blueprints.

Q. As I understand your testimony—installing the slab was not extra?

A. It was part of the floor—

Q. Part of the floor in the garage?

(Testimony of Burton E. Carr.)

A. Yes.

Q. Was there any slab installed there other than the floor in the garage over the boiler room? Was there more than one slab put in?

A. No. That included the contract for the slab over the boiler room—because he initialed that when he signed the contract.

Q. And that is in the specifications?

A. That is in the specifications.

Q. All right, now. Those first two you say are extras?

A. Yes.

Q. What about the rest of them?

A. No. D is correct—that was removing the pumps from the position they were—and moving those over—that was correct. [165]

Q. Who moved those pumps?

A. Mr. Gothberg moved them.

Q. When were they moved—about what date?

A. I couldn't give you exactly what date they were moved, but I will tell you—that's one thing that gripes me right there—is he gives orders to do all this here and that was done. He made this out December 28th. Well, that was done a long after the 28th. That's what I can't understand about this letter—because we were in business and operating after February—and we was pumping gas out of those before we moved them over—and this letter was dated the 28th—giving orders to do this work—and this guy had no idea about me changing pumps because I never seen the man.

(Testimony of Burton E. Carr.)

Q. Did you ever talk to Mr. Anderson about changing the pumps?

A. No, because after I paid him he was gone.

Q. About what date did you pay him, Mr. Carr?

A. Mr. Gothberg said the plans are satisfactory—that's when I paid him then. I don't remember the exact date but I know he completed the plans—and I had Mr. Gothberg look at them—and he come back the next evening and we give him his check because I was unhappy about the amount he charged.

Q. What did he charge?

A. Twenty-Seven Hundred and some odd dollars. Mr. Gothberg figured it would cost me between Six and Seven Hundred Dollars if I would get him.

Q. At whose instance and request did you employ Mr. Anderson? A. Mr. Gothberg's.

Mr. Arnell: I wish to interpose an objection. We went through this yesterday and I think the whole subject matter is immaterial. I didn't object yesterday, but this is purely repetition of it.

Mr. Bell: That last question was, your Honor. I remember I did ask that other question yesterday. I will withdraw that question. The others are proper, I think.

Q. What about the rest of that letter? Check that over and see if there is anything of them that is a proper charge against you.

A. "One plunger hoist shown"—that is not correct—and No. F is "increase the height of all plate glass windows to seven feet"—that is correct.

(Testimony of Burton E. Carr.)

Q. When were the windows changed inside, and when were they put in?

A. Oh, that was changed before they ever got even the front of the building on there.

Q. Was it before that letter was written—prior to the time the letter was written?

A. Oh, yes, that was already in. That's why I can't understand this here—because that had already been changed at that time—because the building was already under construction; in fact, I believe the windows was in about the [167] time that letter was wrote because they had to pour that concrete over the top of the windows—but that wouldn't be any extra charge—in fact, he would be saving money on it by raising them up. It wouldn't be any extra work.

Q. Is there anything else on that letter—that you know of—that was done?

A. I mean the glass would cost a little more, naturally. "G—the northeast wall is to be changed to spandrel construction by pouring three columns in this wall." I don't understand just what that is. I never seen that before.

Q. Mr. Carr, what was the wall originally to be made of—that angle wall in the corner?

A. That was blocks.

Q. Cinder blocks?

A. Cinder blocks, yes.

Q. Now, how long is that wall and how high is it?

A. Let's see. The height of the building, I be-

(Testimony of Burton E. Carr.)

lieve, that's between eighteen and twenty feet—and that length in there—it could be around thirty feet—I wouldn't say exactly.

Q. Now, do you know whether you changed that yourself or was that changed by somebody else?

A. You are talking about the wall—where the glass—

Q. The kind of construction on that wall on that angle.

A. Oh, I changed that myself—for the simple reason I knew these blocks had to come out again—so I decided to put [168] windows in there.

Court: Is there some mention of concrete pillars—are they mentioned in that item? There was some testimony yesterday about pillars.

Mr. Carr: I am getting kind of mixed up about my directions—now, northeast wall—that is the wall that goes on an angle, you mean?

Q. Yes.

A. That is the wall I had reference to—that the blocks were all frozen and loose—and you could poke them out by your hands—and they was all wavey—and he moved the blocks and we put in plate glass windows—seven feet. There had to be a concrete form poured over that to hold up the windows. That would be part of the extra work.

Court: It mentions three columns. What does that mean—do you know?

Mr. Carr: No.

Mr. Bell: Those are poured concrete, your Honor, reinforced.

(Testimony of Burton E. Carr.)

Court: I am asking the witness if he ordered it, or knows anything about it.

Q. Did you order those columns put in there at all?

A. I ordered that part of the work done—but if the columns was needed to hold up the building to protect the glass—it would have to be in there, yes. [169]

Q. Did you know they were going to pour three columns? Did you tell them to pour three columns in there?

A. No, but that cement in that one place where the building is cracked—all the way through there is a big slab of wood in there that caused that whole side to break. I didn't contract for the slab of wood put in the concrete.

Q. Well, did you know that Mr. Gothberg was going to pour those three columns in lieu of cinder blocks that he was using?

A. Would you ask that question again?

Q. Did you know—when you talked to Mr. Gothberg about changing this frozen wall to put in glass instead of the blocks—did you know then that they were going to pour some concrete pillars in there? A. No, I didn't know.

Q. And from your experience in the building there, and seeing what went on, was it just as cheap to pour the concrete as it was to lay the cinder blocks and furnish them?

A. Well, I don't think there would be much difference in the price—because cinder blocks cost

(Testimony of Burton E. Carr.)

so much and the labor—and you could take this plate glass and put it right up in place. I think probably one would offset the other. Probably a difference of dollars and cents—but it wouldn't be too much difference.

Q. Now, you heard him say that the floor in the garage was out [170] of level and that you complained about it, and he leveled it by pouring some skimcoat or something over it. What do you know about that? Did you see anything like that?

A. Yes, there was about two inches—instead of the skimcoat—and he said he poured that—he put in about two inches of concrete over the other—and they just kind of humped it up—it was bad—there was just a couple of them.

Q. Did he fix two of the big depressions?

A. Yes.

Q. And what is the condition of other depressions in your concrete floor?

A. You are talking about the shop now?

Q. Yes, the shop.

A. It is very uneven when it is raining. The water seems to go every place except down the drain. It will drain a certain amount if it happens to be fairly close—and then there are dips of water. The fellows have to take brooms and sweep because it is all over.

Q. How many drains were installed in the floor?

A. I don't remember just exactly. Let's see—about six of seven, I believe.

Q. What kind of caps were put over them?

(Testimony of Burton E. Carr.)

A. Well, I squawked about these caps when they put them on. I said they don't look like very good manufactured articles and he said they were built special. "We made those special [171] for you"—that's what Anchorage Installation told me and I told Mr. Gothberg they wouldn't hold up—so in just a few days a car happened to roll over one and it broke off. Finally some more of them broke off so we made them in the shop ourselves—and we cut holes and drilled them so the water could go down.

Q. What kind of plates did you put over them when the plates broke down?

A. Quarter inch pipe. The ones that was on there—you could break off with your fingers.

Q. Did all of those break down?

A. Yes. But they wasn't exactly the ones he showed me he was going to put on when I went over to Anchorage Installation—the ones he told me he was putting on had quite a large space for the door to the trap—but when those were installed I never noticed until that one bent that way. The door went right down into the sewer—the ones he showed me were constructed different.

Q. Do you remember how much it cost you to fix those drains?

A. I believe it was around \$30—Thirty and some odd dollars—I don't remember exactly now.

Q. Do you have a credit amount in the notice that you served on Mr. Gothberg?

(Testimony of Burton E. Carr.)

A. Yes. We fixed them ourselves but that was our cost price on them. [172]

Q. Did you have these men that fixed that for you on your payroll at the time working for you?

A. Yes.

Q. What about this garage floor in the winter time—when there is snow on the cars that are worked on in there. What does it do?

A. It's just all over the floors. The fellows can't even work unless they have a broom in one hand and creepers in there—pushing the water out to dispose of it. We usually have to push it across the washrack—and there on the washrack side so it will drain.

Q. Will it be necessary to put in a new floor in the garage before it can become a practicable garage?

A. It would have to be.

Q. How long have you been in the garage business, Mr. Carr?

A. Oh, let's see—I was in Seward—I started there in Seward in '32 to the present time—up to March. That is, I was in the business in Port Angeles, and in Bremerton, Washington.

Q. Have you been in the garage business, then, for a long number of years?

A. Many years, yes.

Q. Is it practical to try to operate in a place with water standing all over the floor, where your mechanics have to work? [173]

A. No, it isn't practical—that's one thing I wanted—I wanted a good, nice floor so it would be

(Testimony of Burton E. Carr.)

something I could be proud of—so when a car was run in there in the winter time—the water would go down instead of wading around in mud like places I have been in in the last few years.

Q. Were you present when they were laying this concrete floor?

A. Yes, I was.

Q. Did they use anything to get it level and properly drained?

A. Well, this fellow that was fixing it—I noticed when he was getting something leveled off with two-by-fours—and he would use that as a straight edge—that is how the floor is laid.

Q. He didn't use a level or an instrument to keep it level?

A. No, there wasn't anything used while he was leveling the concrete.

Q. Now, he attempts to charge you \$500 for a beam up in front of the building that he put in there. Did you authorize him to change that in any way?

A. No. He initialed that plan—and it says the beam in there just as planned—and it would show another piece of lumber. It shows all the lumber in the beam—and the steel work and everything—it's very plain and anybody would understand that—why, it's part of the building that he put up.

Court: I think before we take up that subject we will [174] have a recess. You may step down. Ladies and gentlemen of the jury, during the recess you will remember the admonition of the court as to

(Testimony of Burton E. Carr.)

duty. The court will now stand in recess for 10 minutes.

Thereupon, the court, at 10:58 o'clock, a.m., recessed until 11:10 o'clock, a.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Counsel may proceed with examination of the witness, Mr. Carr.

Q. Mr. Carr, I have on the easel in front of you, here, the plans that were introduced by the plaintiff, and especially call your attention to one that is BCG 8—and ask you to state if you know, and point out with the pointer, where that \$500 beam shows in the plans?

A. I can point out here on this plan where it is—but that's another plan—the identical same plans. Right here. This is a part of it right through here. It goes right through here and that is the end. When you come down to the garage you can see it—it's part of the building. It is not part of the other steel structure at all because this comes down through here—and this was made. This is steel that Mr. Gothberg had to furnish—and they furnished everything else on this plan. There is no reason why he shouldn't furnish the steel because the steel is on there—just like the doors [175] or any other part.

Q. Would you please point—on the big plan here—where that big beam went through?

A. It passes through here—and it went down right through here.

(Testimony of Burton E. Carr.)

Q. And that is the plan he had before him at the time he made the bid?

A. Yes, that's right. The way that beam is—it has to be on there—if I can explain a little further—this beam has to be here so when this comes through here it would have to have something. This is a beam here—and this was cut in like this—and the timbers was cut in through here—and those has to be up against here so the marquee would have something to rest on. The marquee would fall on that big piece over the gas pump.

Q. Approximately how long were those timbers, showing through there, from the back side of the marquee to the front side of the marquee, at the longest point, approximately?

A. I would say about 24 feet—they're a pretty good size. It took this beam in there to hold it—and this had nothing to do with the steel I furnished—because it had to be on this marquee. It's part of the marquee—the same as the rest of the boards.

Q. Now, your original steel had nothing whatever in it concerning the marquee in any way?

A. No, it wasn't.

Q. And Mr. Gothberg furnished all the steel and all the building material for building that marquee?

A. Oh, yes.

Q. Did you ever agree with him to pay \$500 for that beam?

A. Absolutely not—in fact, I didn't know anything about it—I knew it was in the plan but—

(Testimony of Burton E. Carr.)

Q. Did he ever mention or claim at the time he was putting in this steel that that was extra?

A. No, he never did.

A. Mr. Carr, a few moments ago I showed you a check for \$285.92, payable to the Anchorage Installation Company, and since that time I have found a bill here, and I am going to show you, and ask you if that is the bill that that particular check paid?

A. This is that check of Two Hundred Eighty-Five, yes, but that did include this here tank that I was telling you that we got for the residence.

Q. How much is the tank for the residence?

A. That was \$37.85.

Q. And that check for \$285, that you paid that month, did cover the tank out at your home?

A. Right.

Q. Then, as I understand it, from that check—\$37 and something, is your own personal obligation? [177]

A. Yes, that's right.

Q. And the rest of it went to the building?

A. Yes, the rest of it went to the building—but I don't understand this—it says extra work for relocating of water line in the building—but there was no extra work for relocating the water line in the front because I didn't change any of that part.

Q. But it was paid for working on that building?

A. Yes, in fact I wouldn't have paid that bill if I had seen it before my wife wrote out the check for it.

(Testimony of Burton E. Carr.)

Q. Then, as I understand, all of that check now —am I right—was paid out for work on the building, except the \$37.85 for your home?

A. Yes.

Q. Will you please tell us what the amount of the part was that was applied on the building?

A. The amount of the part that was applied on the building was \$248.07—and here's the bill. Let's see—this is the bill from Anchorage Installation Company.

Mr. Bell: We now offer the bills in evidence and also reoffer the check in evidence.

Mr. Arnell: We renew our objection, your Honor.

Court: Let me ask a question. Mr. Carr, is it your claim that this amount of \$248.07 the difference between the total check and the amount of \$285.92? It is your claim that [178] this represents work done by Anchorage Installation that was covered by the contract, and that Mr. Gothberg was obliged to do under his contract?

Mr. Carr: Yes.

Mr. Arnell: If your Honor please, the witness has already testified in response to direct questions by Mr. Bell that he didn't know what the work was for—and I still think that he doesn't know and the point of the Court's questions, I think, calls for an opinion which he is willing to express and already has. His contention is not the basis of our objection, your Honor. There is no proper foundation, no identification of the work, as being within the scope of the contract.

(Testimony of Burton E. Carr.)

Mr. Carr: Well, the work—it says the water lines—but that was Mr. Gothberg's contract—that water pipe and all that stuff was in the contract of the building.

Q. Where did you get these bills?

A. They mailed them to us—my wife paid the bills, as I say, I wouldn't have o.k.ed that one because that would have been Mr. Gothberg's.

Court: These bills—when your counsel first inquired about the check—you didn't have any of the bills, with you?

Mr. Carr: No.

Court: They were since secured in your files?

Mr. Carr: We found them in the files. I didn't know where they were. [179]

Q. Are you sure that the check was given in payment of these bills—that is \$37.85—

A. Yes, we have another paper there. I believe I seen where the two of them was added together. You have it there.

Court: \$37.85 for one storage standard range boiler—and then the other bill is New Nash Garage. Do you know why these bills were not charged to Mr. Gothberg? Why would you be charged for them? They were working for him, weren't they?

Mr. Carr: Yes, that's right. There was an error in their office down there for that particular one. They sent it to us and my wife paid the bills—so she just happened to pay it—but I usually o.k. the bills that came through—but that was paid before I o.k.ed it.

(Testimony of Burton E. Carr.)

Court: I don't want to shut out any evidence that—

Mr. Carr: It says New Nash Garage in there—in writing.

Court: I think if there is anybody at Anchorage Installation that knows about this, before the case closes, he ought to be called in. The objection will be overruled and the check and accompanying papers may be admitted, although there may be some doubt as to sufficient identification. It may go in as one exhibit and they will go in as Exhibit I. That will be the check and the statements of account.

Q. Mr. Carr, in the contract and specifications, it is provided and was admitted by Mr. Gothberg yesterday that he was to furnish a compliance bond. Did you ever waive his [180] furnishing that?

A. No, I never did.

Q. Did you ever agree that he could go by without filing it? A. No, I didn't.

Q. Do you know what the purpose of the compliance bond is?

A. Yes, I do—that is the reason.

Mr. Arnell: If your Honor please, we object to this line of questioning. It calls for conclusions of the witness.

Court: Maybe he knows—he is an experienced man. Overruled. If you know, you may tell.

A. Well, when they are building a building and take a contract—if you take a contract on the building—and if we have paid Mr. Gothberg in full for

(Testimony of Burton E. Carr.)

his building—and he never paid any of his sub-contractors—they could make me pay all those. They could make me pay the bill. That is the reason they have a bond—so the bonding company is liable for those bills not paid. It is a very important thing; in fact, I never make a contract without one put in.

Q. Did you ever talk to him in any way, indicating that you would waive his compliance with that?

A. No, he mentioned that he didn't want to at one time. I told him absolutely not—he would have to have it—and he said he wasn't making any money on the building—and I told him no—I wouldn't waive it.

Q. Then you understood and knew that all sub-contractors or [181] laborers could file a lien on your building up to ninety days after work was all finished?

A. Yes.

Q. Now, No. 2 in this demand states that plaintiff failed to hook up the lights on the 7600 pump. Would you please tell the jury what he failed to do there—in your own words.

A. There wasn't any wire dropped to the beam for the lights—so you can see when you are pumping the gas—and that one light was out all the time. I asked him a number of times about it—and he said it was up to the electrician. I would call them and they wouldn't bother to come down and do it—they never went down until we sold out and had these boys down there and do it.

(Testimony of Burton E. Carr.)

Q. After you sold the building, it was done later?

A. They had it done down there after the building was sold.

Court: Who had it done?

Mr. Carr: Mr. Akers and Mr. Johnson.

Court: The purchasers?

Mr. Carr: The purchasers.

Q. In dealing with the purchasers, were you required or did you guarantee to put this building up in proper condition?

A. That's right. In the contract there was certain items that wasn't completed—and that we were to complete it up to a satisfactory way—it is supposed to be—

Q. Now, then, No. 3 is: "Failed to install one globe and [182] window light on marquee." Tell us about that.

A. Weil, that never was installed. The light globe is just a small item that could be put in—but I never checked it. There never was any wires going to it—but there was some reason why the globe was never put in—and this window glass that goes on the outside part of the light on the ceiling—that was never put in—but I don't believe even the wires was put in up to it. I believe that's why it was left out.

Q. You say he failed to install front window glass that would fit the opening made by the plaintiff, and did cause to be installed a glass that is too small? Will you explain that to the jury.

(Testimony of Burton E. Carr.)

A. That is a plate glass window—one of the large windows in the front—and when they put that up there—when you see it you will see. It is a pretty terrible job—and the bottom is shoved up so it holds on about one-eighth of an inch on the bottom part of the glass top, someway. In fact, when the glass drops down below you can put your hands in the top of it—it is shoved up to hold it in. If there was a little explosion or blast of a door, I believe the window would fall out in the street.

Q. You did request him to fix that in this notice?

A. Yes, and he said the glass man cut the glass too short. I talked to the glass man and he said all the glass was [183] identical—and that the building gave away on the front on account of his not tying the steel—and settled that front so the first glass fit all right—and the second glass had a little opening in it—and they did a little seaming on that third glass—and it wouldn't fit. The building sank down in front.

Q. Was there a crack in the concrete in that front wall?

A. A very bad crack all the way up—that's where he left this piece of wood in the concrete—also where he connected this foundation that he moved in the front—and cut off part of it—but he didn't connect that part good enough so that gave away—and that let the whole building down.

(Testimony of Burton E. Carr.)

Q. What was the front wall? How deep did he cut that front foundation wall down?

A. It was supposed to be put the same—and it was around about six or seven feet—and he put three feet down. I asked him about it and he said it was just as good a footing—three feet—as it would be seven or ten feet.

Q. That makes me think. Did you get a piece of mortar down there off those blocks? Did you bring one here to the Court with you?

A. Yes, I did.

Q. Do you have it there?

A. I will show you. This mortar here is one piece of it—[184] there, you can see here. It disintegrates—breaks up. It calls for sand and cement on there—and they put some kind of a white stuff in there—and you can just scrape it off with your fingers from the blocks.

Q. Did you get that yesterday at the place?

A. Yes, I got it yesterday—I broke it off—it broke very easily with my finger—it just breaks up in my fingers.

Q. That is the ordinary and regular mortar that he has left between the cinder blocks?

A. Yes, in fact some of the blocks upstairs—well, you can see that very easily—going into the show room upstairs there—back of the counter—you can see where the blocks are loose—and if you grab hold of it it breaks right off and you can see all through all those blocks in through there.

Q. Mr. Carr, is that anywhere's near the stove

(Testimony of Burton E. Carr.)

he claimed you had in the building, trying to warm it up.

A. That was fifty feet from the stove. That stuff was frozen when he put it in.

Q. Now, No. 5 in your demand to him to comply with the contract stated: "Failed to install a proper shutoff valve below the concrete in front of the building to prevent the freezing of the outside hydrant, and did install the hydrant in such a sloppy, incompetent manner, without proper shutoff, so that the same froze on two different [185] occasions, causing damage to parts and requiring labor to the extent of more than \$20 to make repairs, and still there is no shutoff below the pavement in the proper position as meets the requirements and the ordinances of the City of Anchorage." Now, would you please explain what this No. 5 request was?

A. Well, there is a water line that goes out from the inside of the building—it goes out to the front of the marquee where people get water—and there should be a shutoff valve in the winter—you can't use the water in the winter time—shut it off in the floor so it won't freeze outside. There is no shutoff valve put there—but the valve is put up above in the block. I said at the time that that won't hold and he said it will be all right—he would guarantee it—it would never freeze inside the building, but it did freeze and broke the valve and we had to put a new valve in—and the next time it broke we had to take the valve out altogether and wrap all that heavy insulation around there this

(Testimony of Burton E. Carr.)

last spring—when the thaw came—so I don't know what it will do this next winter. We didn't use it this year at all.

Q. You haven't used it this year? A. No.

Q. Did you make an expenditure of approximately \$20 for fixing that? [186] A. Yes.

Q. And would you say that \$20 was a reasonable charge for doing the work they did?

A. Very reasonable. All of our work that we do in the shop that way—we always do it at cost—so in our tax we can put our cost, labor and repairs.

Q. Now, this \$500—No. 6—that I just asked you about—this \$500 that he attempted to collect as a special charge for this steel beam—do you owe him that, or any part of it?

A. Absolutely not.

Mr. Arnell: May I interpose an objection here? Upon my recollection, we went through most of these yesterday.

Mr. Bell: Then you got up and made a big fuss about my not reasking him about that beam—because we had gone through it so I wanted to do it.

Court: I think it was inquired about—however, the answer may stand.

Q. Now, No. 7 in your demand was that he failed to finish and install outlet plates on electrical contacts. Now, did you ever tell him that you didn't want him to put those on—that you wanted to put those on yourself?

A. I didn't tell him I wanted to put them on

(Testimony of Burton E. Carr.)

myself—but I told him that I wanted to finish the walls—and I didn't want them on right at that time—but the electrician was still working in there and they hadn't finished—so I [187] had a painter come in and finish the walls—and the next morning I said O.K.—to put those on, but they never put them on. We have called them up about it—and when he left he said, “I am in a hurry now”—and he said there were only three or four plates—and that was not enough anyway—and the electrician would get the other plates and he would put them all on at the same time—but they have never been put on. We put a few of them on—but the ones on top—we didn't have the labor and they were never put on.

Q. All that was put on, your own employees put on? A. Yes.

Q. Now, Article 8: “Failed to furnish solid brass cylinder locks on the front doors.” Do your specifications call for that?

A. Yes, they called for solid brass locks—regular store front—that anybody would see in any store front.

Q. Now, did you buy those locks yourself?

A. Yes. Mr. Gothberg said there wasn't any available—and he put regular bathroom locks or backdoor locks—you can break a window from the outside and push a little button and walk in. I examined them very closely—and they were brass—just brass—washed on outside over a cheap lock—so he would just put them on temporarily, he

(Testimony of Burton E. Carr.)

said, because he couldn't buy what he wanted—and I asked him why he [188] put those big holes in there—I said, “There is some in town”—and he said, “If there's any in town you go ahead and buy them and I will pay for them and put them on.” So I went over to the hardware store and asked if they had them and he said sure—so I bought them—I paid \$45 for them—so he installed them.

Q. Did he ever pay you the \$45? A. No.

Q. Did he ever give you any credit for the \$45?

A. No.

Q. What did that do to the doors—cutting those different holes?

A. Well, the doors is weak—the door was thin in the first place—and by the time this big hole—about that big—was in the door—then they cut the hole this way. A good push by somebody's foot and I imagine the whole thing would break out.

Q. No. 9: “He failed to install push plates and kick plates on five doors as per contract.” Now, would you tell the jury about those kick plates and push plates?

A. After talking to him a dozen times about those, he finally put part of them on.

Q. What part did he put on?

A. He just put on the two front doors—he just put the kick plates—and let's see—I think just kick plates. I don't [189] remember, and, let's see, I think just these plates was put on—I don't remember seeing any push plates.

Q. What about the other doors?

(Testimony of Burton E. Carr.)

A. Nothing was put on the others.

Q. There is only one push plate on the front door and the kick plates are not on?

A. On two front doors.

Q. And the three other doors have none on?

A. They are supposed to be on all doors—the men's room and the ladies' room—and the swinging door that goes into the show room—and those other two doors opposite the third door—we eliminated in the contract, which no credit was given on that.

Q. And he didn't put them on? A. No.

Q. I see. Now, he testified that all those doors was extra—that they don't show in the plans and specifications. Did those doors show in the plans and specifications?

A. It shows in the specifications, yes, and it tells what kind of hardware that goes on—and how they should swing—double swing door.

Q. Did he ever put the double swing door in?

A. No.

Q. Has it ever been put in up to this time?

A. No, he put a very cheap door—a one way door—and the others [190] it isn't according to specifications—in fact, he had carpenters down two or three times shimmiing them—and now, every so often, you can't open or close them.

Q. It says in No. 10: "Failed to furnish, install and equip two-way swing doors between the show room and shop as provided in the contract." Was that provided for in the contract and specifications—the two-way swing door?

(Testimony of Burton E. Carr.)

A. Yes, that is the one we were just talking about.

Q. Is that very necessary in a garage operation like yours?

A. Oh, yes, because there is a lot of traffic goes through there—you know—and you work one way and the other way—and they've got to have something through there—it is swinging all day long.

Q. No. 11: "Failed to finish the installation of one heating unit with motor." Would you explain that to the jury?

A. Well, this heating unit didn't have a fan on there—either it was there or was taken off. Anyway, it never was on there. So they did install it at one time—but it shows on the contract if you do something unknowingly—that's wrong—why, the contractor has to pull it out at his own expense and put it in right—but they installed it knowing that this section line was coming through there—for the place between the showroom and the shop—and so they took it down—but they were supposed to move it over just a foot and they didn't install it—and they said they was [191] going to do it but never did.

Q. Is there any motor in that thing?

A. No, they never did furnish a motor.

Q. And they never did reinstall it?

A. No, it's lying down in the basement.

Q. It is your contention that when they installed it in the first place, it was in the wrong spot—and when he put his own partition through,

(Testimony of Burton E. Carr.)

he had to take it down—and just didn't reinstall it. Is that right?

A. The partition was changed—as Mr. Gothberg said we changed it from where it is supposed to go to give the showroom a little more space. We moved it three or four feet. It was supposed to go in that one spot—and it couldn't go in. All they would have to do is put an elbow and push it around—and we could still have used it where it was by raising it up. It was a matter of just about a half an hour's installation on it—and it would have taken no more time on it—but they just took it off and left it off. They could have saved time by twisting the pipes around without changing it.

Q. Now, No. 12: "Failed to install three thermostats in the showroom, as provided for in the contract and specifications." Did he ever do that?

A. No, he never did.

Q. How many thermostats were installed? [192]

A. There was one, I believe, or two—no, there was one, I believe.

Q. One in the showroom and one in the garage?

A. Two in the garage—and on those thermostats—this contractor that he had—I asked him about those thermostats and he said, "Well," he said, "I tell you," he said, "it don't call thermostats for there." I said that I asked for them—I don't know why it shouldn't call for them—and he said no, he read it carefully. He said, "You should be pretty lucky you are getting better units and more expensive units so you can get into the building so

(Testimony of Burton E. Carr.)

we are giving you those units so you will be able to move into your building sooner.”—so he said, “It don’t call for that but we are giving you better units.” I thought I will check that over so I went up and checked the heater that was in there and the name of them—and what they called for—and that was the one we called for was in there and so I asked him about the thermostats—and he said there was no way of making them work. I said, “If you could put one thermostat in and hook it up, you should be able to hook up the rest of them,”—and so he wouldn’t put in the rest of the thermostats.

Q. What effect does that have on your show-room?

A. The effect it has—we got four big heaters in there—and it drops down to 60 degrees—then the door opens and that [193] thermostat worked like this—all those four big heaters heat and before it gets down it is so hot and then it is so cold—either so cold or so hot—you can’t stand it. We have to set it at a minimum to keep from catching cold—and we had to put electric heaters in both of the offices.

Q. In other words, I understand that thermostats scattered around in the building controls the heat all over the building, while one thermostat would work solely upon the heat at that particular point?

A. Yes.

Q. He never did put those in? A. No.

Q. No. 13: “Failed to install two additional

(Testimony of Burton E. Carr.)

thermostats in the shop." Would you please explain that one to the jury?

A. That is the same deal—it gets hot—but the one they installed in the shop—they installed it right underneath one of the heaters and naturally in the cold weather that heats the building—and the shop sits cold, mostly because it keeps shutting off. We have to put asbestos around that one, and try to cover it up so the heat won't heat it—it shouldn't be underneath there at all.

Q. Did they ever install the other two thermostats provided for? A. No, they never would.

Q. Now, No. 14: "Failed to mount and install door frames in [194] lead, according to the terms of the contract." Did he ever do that?

A. All the doors there are supposed to be white lead. When they set those jambs in there between that lock work—it wasn't put in there—and in the winter time the wind blows—you put your hand there and there is air blowing through all the time.

Q. You heard him testify yesterday that he did set those casings in lead. Have you examined those to see whether that statement is true or not?

A. Yes. I saw that when they were put in there—I mentioned about it and there was no lead put on there at all.

Q. Or at any other time? A. No.

Q. Now, No. 15: "Failed to finish the building on the outside and allowed projecting wires to extend, and has left the wall rough and uneven." Would you please describe that to the jury?

(Testimony of Burton E. Carr.)

A. Well, I talked to Gothberg a number of times on that and he sent down a man to do that work—so what he did—he mixed up some concrete and took his hands and threw it on with his hands—then he takes the sack and wipes it all off and I says, “What are you doing there—that’s supposed to be a smooth surface.” And he said, “I am working for Gothberg—he is paying my check and that is the way he told [195] me to do it.” That’s sacking and refinishing—throws it on with his hand and rubs it off—that’s what he calls refinishing.

Q. How long did he work at that?

A. He worked in the front. He put a ladder on the side and broke my neon light, which I had to pay for. Oh, he fooled around there—I guess about a day or so—just wasting his time on the whole thing. I mean, it looked worse when he got through because he wiped his all off again, on the fronts, but on the side of the building and on the back—none of the outside work has been smoothed off and fixed the way it should have.

Q. Do you know how that work should be done to make it smooth?

A. All that overlapping of the concrete out there should be smoothed off and troweled over so it won’t show board marks.

Q. What about those wires that are projecting—or rods?

A. Those should be cut off.

Q. Now, on the inside of the building, what did he do about the main building on the inside there

(Testimony of Burton E. Carr.)

—finishing it up in a workmanlike manner on the inside of the building—the walls?

A. No, that was never finished—it doesn't include finish carpentry—but the walls are rough on the inside. It don't look good at all. [196]

Court: Are the walls all covered?

Mr. Carr: No.

Court: Are they exposed on the inside?

Mr. Carr: Yes, they are exposed.

Court: No insulation on them?

Mr. Carr: No insulation at the top of the ceiling—but it wasn't supposed to be insulation, according to the contract.

Court: We may as well recess right now. Ladies and gentlemen of the jury, you will remember the admonitions of the Court as to duty. The trial will be continued until 2:00 o'clock and the Court will stand in recess until that time.

Whereupon at 11:58 o'clock a.m., the trial of the above entitled cause was continued until 2:00 o'clock p.m.

Be It Further Remembered, That at 2:00 o'clock p.m., the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: The witness, Mr. Carr, may resume the

stand. Counsel for defendant may proceed with examination.

Mr. Bell: Your Honor, if counsel for plaintiff does not object, I have a witness here that's very busy on the job, and [197] it will just be a moment, and if I can use him I would appreciate it very much.

Mr. Arnell: I have no objection to that, your Honor; however, we expect to call the same witness, and will call him later.

Mr. Bell: Call Mr. Cupples.

Mr. Arnell: We also have a witness we would like to call out of order, your Honor, Mr. Ken Luse, he resides at Big Lake and wants to go back.

Mr. Bell: I will consent to that.

Court: All right.

Whereupon,

ARCHIE M. CUPPLES

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): What business are you in, Mr. Cupples? A. General contracting.

Q. As such, do you handle the laying of concrete blocks or cinder blocks? A. Yes, sir.

Q. Did you lay some blocks for the plaintiff, Mr. Gothberg, on the garage that was being built for Burton E. Carr? A. Right.

Q. Do you remember about the date they were laid? [198]

(Testimony of Archie M. Cupples.)

A. Oh, I believe it was in October—late October—or November of 1949 or 1950.

Q. What was the condition of the weather while you were laying them?

A. It was a little chilly.

Q. Was it pretty cold?

A. Well, it was a little too cold for the work we were doing.

Q. Did you, at that time, request heat for the laying of those blocks?

A. It was the understood agreement that Mr. Gothberg was to cover us and give us heat for the block work when the weather turned cold, where it was necessary to do it.

Q. Did he do that? A. No.

Q. Did you request him to? A. Right.

Q. What was his answer?

A. In fact, the inspectors pulled us off the job. I pulled the crew off and they called and asked me why we had stopped work—and I informed him that the inspectors had instructed us to cease work until there was heat and cover put over us—and Gothberg insisted we go ahead with the work which we did—at his responsibility.

Q. And did the mortar freeze?

A. Well, that's kind of a technical question. I don't know [199] where mortar freezes. I can't answer that.

Q. Did you do as good a job as you could, Mr. Cupples, under the circumstances?

A. That is the usual policy with my company.

(Testimony of Archie M. Cupples.)

Q. And which is the best mortar to use in laying those blocks—the regular sand and cement, or the mixture that heats.

A. No, we use sand and cement and hot lime. And when it gets to the point where the hot lime will freeze, you have to resort to dehydrated lime, which we used on the latter end of the job. There is the dry sack mixture and it is pre-slacked, in which you have the hot lime, but after it is solid and cools, then it will freeze, also. We also added 1% calcium chloride in the mixture, which is to offset freezing.

Q. Did you have to add that other—or quit doing the work?

A. Well, we did both.

Q. You added that as long as it would work, and then you had to quit, did you?

A. Well, yes.

Q. And have you been back to see that job since?

A. Several different times—in fact, we went back the next spring and pulled the chimney down and rebuilt the chimney.

Q. Was the chimney in bad shape?

A. Well, it was necessary to pull it down.

Q. Have you been paid in full for your work there? [200]

A. Up to a certain extent, yes.

Q. Is there some balance that you haven't been paid?

A. No, it was agreed upon—settlement price—

(Testimony of Archie M. Cupples.)

which was a little less than the remaining balance at the time.

Q. How much was the amount that you should have received, and what was the amount you did receive?

A. As I recall, without checking on the books, it was \$770 and a few odd cents, and we settled for \$700.

Q. And the \$70 had never been paid?

A. No, never been paid.

Mr. Bell: You may take the witness.

Cross Examination

Q. (By Mr. Arnell): When did you first start to lay the block there, Mr. Cupples?

A. I couldn't tell you the exact date—we would have to go back into the records.

Q. One of your answers to one of Mr. Bell's questions—you said it was October or November?

A. It may have been into November, but it was pretty chilly weather when we started the job.

Q. How far along were you in your work when the inspectors asked you to discontinue?

A. We had finished all of the solid block wall on the west side of the building, which was the first wall put up— [201] and some of the block work on the south end—and we were about half way up on the east wall when we stopped work.

Q. Now, as you laid the mortar in this weather, did it freeze before you could place it—place the blocks?

(Testimony of Archie M. Cupples.)

A. Usually the principle is to spread mortar for several blocks at a time on the edge of the top across—then you place your block—and it was necessary for us to spread mortar for two blocks instead of six blocks, which slowed the work down and cost us more, because of loss of efficiency in the workmen.

Q. Did the mortar freeze before you could place the block and work the mortar—

A. It even froze on the mortar boards.

Q. That might be true, Mr. Cupples, but as you were laying the blocks, did the mortar freeze before you could place the blocks properly?

A. It froze as we placed the blocks, because the blocks were full of frost and the hot mortar would pull the frost out of the blocks into the mortar and freeze it.

Q. But that occurred after the block was already laid, or it started simultaneously with the laying?

A. I would say with the laying—it has a tendency to freeze almost immediately.

Q. My point is—the mortar didn't freeze so fast that you couldn't place the blocks? [202]

A. Yes, we could only spread mortar for two blocks.

Q. But when you were laying those two blocks, you had time to lay them before the mortar froze, did you not?

A. You could, yes, but it wasn't the proper way, because the mortar would freeze and we would have

(Testimony of Archie M. Cupples.)

to pound the block down into the partially frozen mortar.

Q. Now, you have explained that, after you went on the job the second time, that is, after the shut down—that you used a dehydrated lime, I believe you said?

A. I believe we were even using that before we quit the first time. We used hot lime—the slacked lime that we had—as well as we could, and it would freeze solid every night, and it is impossible to use it when it starts to freeze. You can't break it, or anything, to get it out of the box.

Q. Did you use lime all the time in the laying of the blocks? A. Always.

Q. Even those that were laid at the beginning?

A. Lime mortar mix is more or less of a set way—one part cement and one lime and sand.

Q. Is that what was called for in the specifications?

A. Well, it isn't specifically stated in all specifications, but that is more or less a standard mix, and when it is stated—unless some peculiar characteristic on the job—it would be a standard mix.

Q. Then it is standard to use lime? [203]

A. That's right.

Q. Does it make as firm a mortar as mortar in which lime is not used?

A. No, it doesn't make as hard a mortar as concrete mortar, but it isn't practical to use straight cement mortar because——

Q. This type of mortar, though, has adequate wearing ability, does it not?

(Testimony of Archie M. Cupples.)

A. It is standard for the trade, yes.

Q. Now, did the use of the dehydrated lime with 1% calcium chloride—doesn't it reduce its efficiency as structural material?

A. No, that's part of the secrets of the trade. You might say it's more the efficiency that can be gained in the cost that can be derived from the use of the different type of lime. You have to put a sack of lime to a sack of cement in the dry lime, where you can get by with a shovel of cement or hot lime to a bag of cement. Hot lime goes further and gives you the same results. It's cheaper to use hot lime when possible to do it.

Q. Did you not also use hot water as a mixing ingredient?

A. Yes, it was necessary to use hot water to keep it from freezing. It also has a tendency to hold the mortar a little longer.

Q. Did you have any discussions with Mr. Anderson, the [204] architect?

A. Mr. Anderson was the man that told me to stop the work.

Q. Did you have any discussions, after that time, with Mr. Anderson and Mr. Gothberg, with reference to the results of your work?

A. Not at the same time with the two men.

Q. Did you discuss resumption of the work with Mr. Anderson?

A. Two or three days after we came back on the job, I saw Anderson and told him the circumstances under which we were working.

Q. You did continue with the job?

(Testimony of Archie M. Cupples.)

A. Through to completion, yes.

Q. Did Mr. Anderson raise any objection to that? A. It was taken out of his hands.

Q. What do you mean by that?

A. Well, he was sent in there as an inspector, and yet when Mr. Gothberg told me to go ahead over his objections—well, that was up to Mr. Anderson and Mr. Gothberg to settle that end of it. It left me out of it.

Q. Did Mr. Gothberg say that he would guarantee the building?

A. I wouldn't have gone back without his guaranteeing his responsibility for my work, because it was contrary to my idea to go back and finish the job under the conditions we had been working.

Q. I believe you told Mr. Bell that you had gone out recently [205] and inspected the building?

A. That's right. A few days ago.

Q. Will you state to the jury what kind of block was used?

A. There is two different makes of punice blocks on the building—one manufactured by Anchorage Sand and Gravel—and the other by Krause. Some of the blocks were already on the job, that I believe Breeden and Smith, the fall before, had set on the job. Those were placed on the west wall of the building because they were rougher textured—and the ones that Mr. Gothberg furnished came from Krause, which was nicer textured block—and that was used on the outside to give the building a little better appearance.

(Testimony of Archie M. Cupples.)

Q. Were all of the blocks used in the building pumice blocks, to the best of your knowledge?

A. I believe so, yes.

Q. Now, from your examination, have you seen defects in the existing walls?

A. There are some cracks in the building at the present time.

Q. Where are those cracks located?

A. Several on the east wall up there, running diagonally off of the corners of the openings, which is a typical spot for cracks to appear.

Q. Now, are there any cracks on the south side?

A. There is a crack about the center of the south end over the concrete lintels that held the south end of the building. [206]

Q. Are there any cracks in the west wall?

A. Not to my knowledge—I didn't examine the west wall.

Q. How about the front wall?

A. I didn't notice any. There may be.

Q. Now, Mr. Cupples, are cracks in these blocks typical to this building, or are they common to pumice block buildings?

A. Pumice block has a tendency to crack through—expansion and contraction. You have a fine example of that in your school building. They not only crack down through mortar joints but it will split one block and go between the joints of the two below or above.

Q. Is that a common characteristic of pumice block? A. Right.

(Testimony of Archie M. Cupples.)

Q. Now, of the cracks that you observed, would you state to the jury, as you remember them, how they run through the course of the wall?

A. Oh, in no particular fashion. Some run off from the corners of the openings in a diagonal fashion, which is a normal tendency of a crack in a block wall. It has a tendency to crack down through the end joint through the bed joint, so it will go diagonally down or up the wall, but often times it will run vertical. It will go down through the end joint of one and split the block in the next one below. [207]

Q. Did the cracks you observed appear to be cracks that would normally appear in that type of construction? A. Pretty much so, yes.

Q. What was the condition of the mortar of the centers that you examined?

A. Surprisingly good.

Q. So far as you could determine, was there any defect in it?

A. Not without a closer examination than I gave the building.

Q. There is no apparent defect is there, Mr. Cupples?

A. Not from just, you might say, a hurried look. I walked around the building inside and out.

Q. Mr. Cupples, were you familiar with this job site before or about the time Mr. Gothberg took the contract to furnish the building?

A. Yes, in fact I bid competitively against Gothberg on the job.

(Testimony of Archie M. Cupples.)

Q. Then you knew of the existing old foundation, did you not? A. Right.

Q. Was that old foundation complete on the east side of the building to which you have referred?

Mr. Bell: Your Honor, if he is using the witness for himself at this time, I have no objection, but that is not proper cross examination, and I object to it unless he makes the witness his own.

Court: I assumed for some time that he has been using [208] the witness as his witness—

Mr. Arnell: Mr. Bell opened up the field by having Mr. Cupples testify generally as to how the mortar was laid, and how the blocks were laid, thereby permitting us to go into the character and the present condition of the building. I have no objection if the Court wants to stop my questioning. I will call Mr. Cupples later.

Court: It might save everybody time if counsel would put in now his own testimony or this witness' testimony any that he wishes in his own behalf. If counsel doesn't care to proceed now, using Mr. Cupples as a witness for the plaintiff, Mr. Cupples may be excused, when counsel has finished his cross examination—and the objection is sustained as to the last question upon the ground that it is not proper cross examination.

Q. Would you prefer to continue, Mr. Cupples, and finish this up now?

A. It would work out better for me—I would much prefer it.

(Testimony of Archie M. Cupples.)

Mr. Arnell: For the record, then, from now on, Mr. Cupples is the plaintiff's witness.

Direct Examination

Q. (By Mr. Arnell): Were you familiar with the job site before this building was commenced, Mr. Cupples? A. Yes. [209]

Q. Had you been out there and personally looked over the existing foundation that was there?

A. There was a few unusual circumstances in the bid because of the fact that Breeden and Smith had done previous work on the job site.

Q. Do you know, of your own knowledge, how deep the original foundation was constructed?

A. I couldn't tell you offhand—no.

Q. Was the east wall, to which a portion of your testimony has referred, installed at the time that you bid on this contract?

A. That is a concrete foundation wall on the east side of the building. There was some changes to be made and the building set back off the street—I believe twelve feet.

Q. Well, now, in answer to one of my questions, Mr. Cupples, you stated that some of the cracks appeared at the corners of the big door. Do you refer to the big door as the one on the east wall of the building—the one on Denali Street?

A. Yes.

Q. Is that door located over the old foundation or the new foundation?

A. I believe that is at the end of the old founda-

(Testimony of Archie M. Cupples.)

tion. I think the new foundation joined right at the side jamb of that door.

Q. In other words, the door itself would be on the old foundation? [210]

A. I believe so, yes.

Court: Does the building face south? Is it on the north side of the street, facing south?

Mr. Cupples: No, it is on the south side of the street facing north.

Court: Oh.

Q. Well, did the cracks that you observed out there, Mr. Cupples, go through the body of the block, as well as the joint between the blocks?

A. In a few places, yes.

Q. Do those cracks run from the foundation up through the top, or do you recall?

A. I don't believe they do—no—they will start at the top of an opening and continue up or down for a few feet, and stop.

Q. I believe you stated that you didn't observe the front of the building?

A. Not too closely, no.

Q. Did you observe any cracks at the front?

A. No, because I pulled in on the side of the building, and I went in through the back door and looked inside of the building—and came back out through the east door, and walked around to the south end of the building, and back up on the east side. [211]

Q. Did you observe any settlement of the front wall?

(Testimony of Archie M. Cupples.)

A. No, I didn't because I didn't look on the front end there.

Q. Are you familiar with the building generally, Mr. Cupples? A. Pretty much so, yes.

Q. In your opinion, as a general contractor, would it be possible for one wall, such as the Fifth Avenue wall, to settle without there being some evidence or damage to other portions of the building?

A. No, it usually carries itself around the corner, where you are tied in on your blocks and your concrete work. It would almost be self evident on the wall there if there had been a change in the footing.

Q. Now, would you describe the condition of the alignment of the blocks that you put in, Mr. Cupples? A. I don't understand you.

Q. Well, perhaps alignment isn't the correct term. What would the contractor call the line that is up and down on the face of the block—I mean the inside or the outside wall?

A. Well, that would be the plumb—if a wall is vertical to a true line—plumb, which is standard specifications to the extent that it is not even specified anymore. It may appear in the general specifications.

Q. Are the existing walls plumb?

A. That is usually the way we put them in.

Q. I understand that, Mr. Cupples, but had there been shifting [212] of those blocks?

A. Not that was visible or noticeable to the eye.

Q. Now, when you refer to the term "plumb,"

(Testimony of Archie M. Cupples.)

you mean that the blocks are properly lined up, one over the other, at the lower horizontal place, end to end, properly to conform to a straight line, do you not?

A. That's right.

Q. Now, to put the question another way, do any of these walls, viewing them in a horizontal position, weave at any point?

A. Not to my knowledge. The usual procedure is to bring up the leads, which are the corners of the building. You bring these up five or six courses, and then you strike a line on which course of blocks, as you bring up around—it is known as the line or the string, in terms of the trade—so it is almost impossible to get off of either a horizontal line or a true line between those two points. If it is an exceptionally long wall, then you would place a block in the center to pick up the slack in your line.

Q. You used the accepted practices with respect to all this particular construction, did you not, Mr. Cupples?

A. That's right.

Q. In your inspection of the building, Mr. Cupples, did you have occasion to look at the windows in the rear of the building and see a stove pipe going out through one of [213] them?

A. I did.

Q. Did you also, in your inspection, look at the block above the location of this stove part, and also this stove or heater, or whatever it is?

A. I noticed they were broken above where the stove pipe came through out the window.

(Testimony of Archie M. Cupples.)

Q. Did you stand inside and attempt to look through the blocks above there?

A. No, I didn't. I would have had to have a ladder or something to get up above those windows.

Q. Now, as a man of experience in general construction, Mr. Cupples, would intense heat, carried against a wall like this, cause any contraction or expansion in the blocks or the joints?

A. Your expansion and contraction is caused by heat and cold.

Q. Well, then, if there are cracks in the mortar between any two blocks, or series of blocks, over this area, do you, in your opinion, feel that that probably would be caused by the changes in temperature resulting from the heat that would generate by this heater—and subsequent closing off when it was shut down?

A. You say—any holes through the blocks or mortar joints?

Q. Through the joints—not in the blocks themselves?

A. It would have a certain bearing on it—also the acids from [214] the smoke—if that was oil burning—well, I should say almost any type of fire has a tendency to affect the mortar. You will find that peculiar to chimneys.

Q. Mr. Cupples, do you know what the average water content of an ordinary pumice is at the time it is laid?

A. No, I would say that it wasn't too high be-

(Testimony of Archie M. Cupples.)

cause of the fact that the moisture was more or less frozen out of the blocks.

Q. Are pumice blocks more porous than other blocks so that they absorb more water, or rain, or snow, or general atmospheric conditions?

A. They may be a little more porous, yes, but that is one of the advantages of the pumice block in that it has minute air cells in the construction of the blocks, which gives it its insulative value.

Q. I realize that, Mr. Cupples, but in the texture of the block itself, the pumice being ground up, would there be absorption and moisture there?

A. You mean in the process of manufacturing them?

Q. No—well, possibly in the process of manufacturing, and even after they are laid in place.

A. No, I would say they are about equal to a concrete block in absorption after they have been in the wall for any length of time.

Q. Well, if they were subjected to above average temperatures [215] for any period of time, would there be any permanent shrinkage either in the mortar or in the block itself?

A. Pumice is an inert material. It is of volcanic ash—the pumice we use here—and is absolutely fireproof.

Q. Would the heat, though, cause any shrinkage?

A. I doubt if heat would have any effect on it.

Q. Well, if there were a shrinkage, then, between two blocks that had been laid, would that shrinkage have to occur in the mortar?

(Testimony of Archie M. Cupples.)

A. I believe so.

Q. Would that be an uncommon situation where mortar was subjected to fluctuating from one extreme in temperature to the other?

A. As far as the building wall is concerned, it is a little unusual, yes.

Q. I believe you mentioned, Mr. Cupples, that you had bid competitively against Mr. Gothberg?

A. Right.

Q. Did you bid competitively just on this phase of the building, or did you bid against him, also, on the foundation?

A. No, it was a general contract as made by Mr. Carr and the architects.

Q. You did not, then, bid upon the foundation, as you recall?

A. No, I think that was previous work that was already—yes, that had been placed by Breeden and Smith. [216]

Q. Do you mean, also, the revision work had been placed by Breeden and Smith?

A. I don't recall whether that was completed at that time or not. It seems to me that we were to cut off the front end of the building and add the twelve feet on behind. Now, whether that was on the general contract at that time, I am not too clear.

Q. Did you bid on the relocation or revision of the foundation as distinguished from the building?

A. I don't remember if that was in on that particular general contract or whether that was a sep-

(Testimony of Archie M. Cupples.)

arate deal before the main section of the building came up.

Q. Mr. Cupples, in response to a question by Mr. Bell, I think you stated you had to pull down the chimney in this particular building?

A. That's right. The chimney was cracked up—in bad shape—and the next spring we went in there, on the request of Mr. Gothberg, and we replaced the chimney.

Q. Was the chimney constructed, in the first place, out of the same type of construction material as the wall or walls?

A. I believe the chimney is built from concrete blocks—four inch concrete blocks.

Q. Are those the blocks, Mr. Cupples, that were bad, the size of a brick?

A. No, they are 4 by 8 by 16. [217]

Q. 4 by 8 by 16? Is that what the chimney is constructed of now?

A. Yes, with a flue lining in the interior.

Q. When did you originally install the chimney? Was it considerably later than the other work that you have described?

A. Not too much later, no. It was one of the last things that we did on the job.

Q. In other words, all of the structural portions of the wall had been completed, had they not?

A. Yes.

Q. And the chimney was the last thing that was done?

(Testimony of Archie M. Cupples.)

A. The roof went on, although the glass was not installed in the windows.

Mr. Arnell: That's all.

Mr. Bell: Just a few questions on cross examination.

Cross Examination

Q. (By Mr. Bell): Referring to this chimney, did you use the same mortar in building the chimney that you did in building the walls?

A. Same mortar, same men, same conditions.

Q. Now, when you went back to tear the chimney down, what condition was it in?

A. I don't know—it had cracks in it to the extent that it was necessary to pull it down. It was building up a hazard to the workmen in the shop.

Q. Now, did you notice the mortar between the blocks in that chimney when you tore it down?

A. Yes.

Q. What condition was the mortar in?

A. Well, it was a typical condition between the blocks as you find it in any type of masonry work.

Q. Why did you have to tear it down—the workmanship in putting it up was all right, wasn't it, Mr. Cupples?

A. Yes.

Q. What caused you to have to take it down?

A. Because of the fact that it had cracked up during the intervening time—from the time we went in there to tear it down and the time we had built it.

Q. Was freezing responsible for that?

A. I wouldn't know.

(Testimony of Archie M. Cupples.)

Q. Was it built in approximately the same temperature—weather—that the walls were built in?

A. It was a little colder, if anything, a little later in the season. A week or a day or a couple of hours makes a difference in Anchorage, we all know.

Q. It was at least a day later than the walls, was it not? You had finished the walls when you started on the chimney?

A. I would say a week or ten days later.

Q. And the roof was on at that time, was it not? [219]

A. Well, it was on when we finished the walls.

Q. The roof was on when you got the walls done—was that right? A. Right.

Q. When did you go and look at this building, Mr. Cupples, the last time?

A. A couple of days ago.

Q. At whose instance and request did you examine the building? A. Mr. Arnell.

Q. And did you look up over the showroom on the second story, then, inside over the showroom, at the blocks up there? A. No.

Q. You didn't notice to see whether the mortar had frozen out of those blocks, did you?

A. There was no place where I could detect any mortar freezing out of the blocks—no place in the building.

Q. You didn't examine the wall over the showroom, then? A. No.

Q. Did you go upstairs at all?

(Testimony of Archie M. Cupples.)

A. No, not in the showroom or parts section.

Q. Did you go in any part of the showroom?

A. No, not in the front end.

Q. Did your men, or you, lay the blocks in the front wall—the north wall of the building?

A. Yes, over the top of the concrete lintels.

Q. Were they torn out once? [220]

A. It seems to me they were—I'm not quite clear on that point.

Q. Now, the black smoke that you refer to on those blocks—that is only on the back wall, is it not?

A. That's right. A section about six feet wide—I would say—was blackened.

Q. And about how high?

A. It's practically up to the top of the building from where it comes out of the window opening.

Q. In other words, the blackness is from where it goes out there through the window on up?

A. Right.

Q. If there was any heat from that pipe there, that wouldn't have any effect on the rest of the wall beyond the six feet space that you have described, would it?

A. It wouldn't have, no.

Q. That wall is 50 feet long, is it not, the back wall? A. I believe so, yes.

Q. Did you look to see whether you could see light through that wall at various spots?

A. No, because it appeared in pretty good shape, other than the one crack I noticed.

Q. There was a crack up there, was there?

(Testimony of Archie M. Cupples.)

A. A crack appears on the outside of the building.

Q. Does lime make mortar weaker or stronger?

A. I think it would take a chemist to answer that question. [221]

Q. You have had a lot of experience in handling blocks and cement, haven't you, Mr. Cupples?

A. Several years, yes.

Q. Do you think cement and sand makes a stronger mortar when it sets than it does if you add the lime?

A. I would say it is harder—whether it is stronger or not, I couldn't answer.

Q. But it does make it stronger?

A. That's right.

Q. Now, in tearing down that chimney, did you work on the actual work of tearing the chimney down? A. No.

Q. Were you there when it was torn down?

A. Yes.

Q. Did you notice whether or not the blocks were loose, and were just picked up and laid down easily by your men?

A. In a few places—where there was a movement on the chimney—they were loosened on all four sides where we pulled the four different corners down. You could pick a block up off the ones that rested on, and there were other cases we had to break each block against the next block.

Q. In some cases the mortar was still good and held the block, and in other places it was loose?

(Testimony of Archie M. Cupples.)

A. Yes.

Q. Did you state that the chimney—in its condition before you [222] tore it down—became a hazard to the workmen around it?

A. As you would consider a hazard, yes.

Mr. Bell: I think that's all.

Court: That is all. Without objection, the witness will be excused from further attendance.

Mr. Bell: He may be excused as far as I am concerned.

Mr. Arnell: I would like to call Mr. Luse, your Honor.

Court: All right.

Whereupon, Mr. Cupples was excused as a witness and

KENNETH W. LUSE

was called as a witness, on behalf of the plaintiff, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Would you state your name, Mr. Luse, please?

A. Kenneth W. Luse.

Q. Were you in the painting and contracting business in January, 1951?

A. Yes.

Q. Do you know Mr. Burton E. Carr personally?

A. Not personally I don't—no.

Q. Do you know where the Nash Sales & Service Garage is?

A. Yes.

Q. During the month of December or January

(Testimony of Kenneth W. Luse.)

of 1950 or 1951, did you have occasion to do any work out there?

A. I done that painting for Mr. Gothberg, yes.

Q. Now, you say you did that painting? What painting do you refer to, Mr. Luse?

A. Well, the painting was just the structural steel in there—was all I was required to paint.

Q. Did you discuss the structural steel, that was the subject of your agreement, with Mr. Carr?

A. Yes, I was out there several times on the job.

Q. What was the condition of the steel when you were out there?

A. Well, I didn't notice any unusual condition of it—you mean in regards to paint?

Q. Yes.

A. No, I don't recall if any unusual condition of it.

Q. Was the steel such as a railroad rail was—had it been treated in some way?

A. No, it had a shop coat.

Q. When you refer to shop coat, what do you mean, Mr. Luse?

A. Well, usually when the steel comes, it comes already red leaded—it is called a shop coat. In other words, it is primed at the shop or factory.

Court: Primed with what?

Mr. Luse: Usually the red lead.

Court: All right.

Q. Well, were all of the structural pieces that you saw out there coated with red lead paint?

(Testimony of Kenneth W. Luse.)

A. I couldn't say to that, now—but I know that most of it [224] came shop coated—there might have been a piece that didn't have a shop coat, though, but I didn't pay any attention to it.

Q. Did you have any occasion, Mr. Luse, to do any patch work or repair work to the original lead coat?

A. Well, yes, all the braided places, and the rivets that they are put together with, has to be spotted with red lead prior to your field coats.

Q. To the best of your recollection, were all of the beams and joints painted with red lead by your men? A. Yes.

Q. Did you do any other work on the structural steel out there?

A. We put on two coats of aluminum—two field coats.

Q. What type of aluminum? Would you just elaborate a bit for the jury?

A. Just regular standard aluminum paint.

Mr. Arnell: That's all.

Court: Counsel for defendant may examine.

Cross Examination

Q. (By Mr. Bell): Mr. Luse, at that time you were doing quite an extensive contracting business in Anchorage? weren't you?

A. Right.

Q. About how many men did you have working for you?

A. I don't recall at that particular time how

(Testimony of Kenneth W. Luse.)

many—but the [225] winter months it wouldn't be too many.

Q. Could you give the jury an idea how many you had working from September until December?

A. Oh, I probably only had about six or eight men. That's all I usually carry in the winter time.

Q. Could you tell me who the men were that worked on that job so I will have their names?

A. I couldn't tell you, now, without going over my payroll records to show who worked on that job.

Q. Did you see them working?

A. Yes, sir. Gene Macheney was in charge on the job.

Q. And where is Mr. Macheney?

A. Working around Anchorage now.

Q. Do you know his address?

A. No, but he lives out by Merrill Field someplace.

Q. Now, was he your foreman out there?

A. Right.

Q. You didn't take the time yourself, Mr. Luse, to go along and watch these paint jobs done, did you?

A. Well, yes. I had to watch them right along, but I didn't spend all of my time on one particular job, supervising it—no.

Q. You ran a paint store, too, did you not?

A. I did.

Q. You had quite an extensive paint business in your store at [226] that time, didn't you?

A. Well, I wasn't taking care of that.

(Testimony of Kenneth W. Luse.)

Q. Now, how many times did you go out there to that job? Just try to remember the best you can, Mr. Luse.

A. I usually made all of my jobs, anyway, twice a day.

Q. What time of the day would you normally make that job?

A. I couldn't tell you—at various times—I would just make the rounds.

Q. What painting did you do on that job out there? Did you paint all of the inside of the building, or just part of it?

A. No, I think there was structural steel—and I believe there was a wall room that was painted on the inside.

Q. And is that all you can remember that you had to do there—that is all?

A. My specifications I had, if I recall, came under structural steel.

Q. You didn't put any red lead on the structural steel, you say?

A. Yes, we put red lead on it.

Q. You said that was factory placed there?

A. Yes, it was shop coated—but we had braided places—and all of the sections or joints had to be cleaned and red leaded prior to field coats.

Q. Were you there at any time that part of that work was [227] being done?

A. I probably was but I don't recall any specific instance on it, no.

Q. And, Mr. Luse, you wouldn't remember speci-

(Testimony of Kenneth W. Luse.)

fically just what was done on any particular job two years ago, would you—1950 and 1951?

A. Oh, yes. There are various things that you remember, sure.

Q. But you wouldn't remember all the details, would you?

A. Definitely not—all the details.

Q. Ordinarily, where structural steel is fabricated and put out at a regular shop, they put some kind of a prime coat on it, don't they?

A. Yes, it usually comes shop coated with red lead—that is, your prime coat.

Q. And then you had nothing to do with putting that coat on, of course?

A. Outside of spotting up the places.

Q. I see. Can you tell me anybody else that you can remember, now, that worked on that job, other than Gene Macheney.

A. I don't recall—three or four men but I don't know who they were, now.

Q. Can you remember the time of work they worked there?

A. It was sometime in the latter part of December or January. I don't know—it was in the winter.

Q. Was the building fully enclosed at that time or not? [228]

A. Yes, it was.

Q. Was the door and windows in, and everything?

A. Yes.

Q. They were all in when that was done?

A. That's right.

(Testimony of Kenneth W. Luse.)

Mr. Bell: That is all.

Mr. Arnell: That's all.

Court: The witness will be excused from further attendance, without objection, and the Court will stand in recess. The jury will remember the admonitions of the Court as to duty and the Court will stand in recess for 10 minutes.

Whereupon the Court recessed from 3:00 o'clock p.m., until 3:10 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Now, I think if there is nothing else,

BURTON E. CARR

will resume the stand and counsel for defendant may proceed with examination.

Q. (By Mr. Bell): Mr. Carr, in your testimony this morning, I believe you were asked about when you paid the Alaska Engineering people for the plans and specifications, were you not? Were you asked that this morning?

A. Oh, yes.

Q. I hand you a check and will ask you to look at that check [229] and see if you know what that is for?

A. That is to Smith and Lorn Anderson—architects—a check we paid to them for \$2,725.71.

Q. What is the date on it?

A. November 8th.

Q. Is that the check that you referred to this

(Testimony of Burton E. Carr.)

morning as having been given to the architect in payment of his fee? A. Right.

Q. After November 8th, how often did you see him at the site of the work, if ever?

A. One of them I didn't see at all. Evidently he jumped the plane as soon as I give him the check. The only time I had conversations with him was over the telephone—but I believe I saw him one time—it could have been twice.

Q. After November 8th? A. Yes.

Q. Now, Mr. Carr, were you there when the painting was done on the steel work?

A. Yes, I was there because we were moving in the building—and I stayed at the new building—and I took care of where I wanted the equipment set—and the parts bins and all. I was there all the time.

Q. Can you tell the jury how many men were working on the painting?

A. There was around three or four men—I couldn't say exactly— [230] it could have been just three.

Q. About what time of the year was it? About what date was it that they were doing that painting?

A. Oh, that was around—I couldn't say the exact date. It was in February.

Q. Of 1951?

A. Yes, because we were moving in so it must have been right around that time. We were moving in and it took quite awhile to move—we couldn't

(Testimony of Burton E. Carr.)

move in one day. It was quite awhile for us to move everything over—it was quite a job.

Q. Did you ever see any red lead or red paint of any kind used by any of those men?

A. No, I didn't. You see, when all this steel was laying out on the ground for over a year it started in rusting—and the only thing I saw—they had a little broom and were wiping it off—and then they started putting aluminum on so they finally got from one side to the other—I'm not sure whether they completed it all that day, but it seemed to me like at 10:00 o'clock the next day they finished it up—just one coat, that was all that was put on—no red lead spotting—in fact, I made the statement I never seen it before.

Q. Kenneth W. Luse, who testified—did you ever see him before?

A. No, he has probably seen me, being in business, but I am [231] positive I never seen him before.

Q. Now, was there more than one coat of paint put on this steel at any time?

A. Just the one coat.

Q. Did you discuss this matter with the general contractor, Mr. Gothberg, at the time?

A. Yes, I did, but he said it didn't need red lead—I told him the specifications called for one coat of red lead on account of the steel being scuffed—and that's what he was paid for—one coat of red lead and two coats of any paint I wished—that was

(Testimony of Burton E. Carr.)

in the contract and it only received one coat—very thin.

Q. What is the condition of that steel now?

A. Well, I was up there last night when I got through, and went up above the showroom and it started to rust through there. You can take your fingers and see it is rusting there under the other paint. The whole thing will have to be chipped off and painted with red lead—and put the other paint on.

Q. Did you tell Mr. Gothberg that there was only one coat of aluminum that you saw?

A. Yes, and he said he would check with them. I told him I was moving the equipment in and I would like to get the rest of that paint on because the customers were coming in with the cars and I didn't want to foul the place up—and he said [232] he would check and he come back and said—he claimed they put two. I said, "Did you see them put two," and he said, "No, I didn't," and I said I didn't either—that they only put one coat—that's all was on there.

Q. I was questioning you about the various sections of the demand that you had served on Mr. Gothberg, and I will continue now, but before doing it I would like to ask you if you have compared this picture here, on this rotary magazine, with the one that is in your place, and tell the jury whether or not it is the same identical one.

A. It is the same—identical to that.

(Testimony of Burton E. Carr.)

Mr. Bell: We now offer in evidence the picture of the rotary lift.

Court: Is there objection?

Mr. Arnell: We renew our objection, your Honor.

Court: The objection is overruled. This is only for the help of the jury. The witness says this is a true picture of the one put in. It is admitted for that purpose.

Mr. Arnell: I realize that, your Honor. I didn't mean to base my objection on that attempt to deprive the jury of the benefit of this, but the contention is whether this is called for in the plans and specifications. The mere fact that this is a commercially named device called "rotary" does not mean it is within the original plans and specifications.

Court: That is a matter of argument to the jury. This [233] is admitted only as a picture of the lift that was actually put in the place, and it may be admitted and marked Defendant's Exhibit J.

Mr. Bell then read the first page of Defendant's Exhibit J to the jury.

Q. Now, in your demand of the plaintiff to comply with the terms of the contract, Section 16 states: "Failed to finish the building on the inside in a workmanlike manner." Would you tell the jury what you mean by that—as to the walls, and floors, and everything?

A. Well, the floors are all uneven and have to be removed to be satisfactory—and the walls—the wires in inside isn't finished on the walls—and the ladies' and men's rest rooms calls for finished car-

(Testimony of Burton E. Carr.)

penry work—and Mr. Gothberg didn't want to put the finish on in the ladies' side. He wanted to leave the wall as it was—it was an ugly block wall and he said it would be extra if he put plyboard over there. I said, "I don't want to leave it the way it is—I want it finished," and he said, "I will have to charge you extra,"—and I said, "Go ahead and put it in."

Q. Did you ever get him to do anything except put that one piece of plywood on?

A. Yes—and you can see in the ladies' restroom—in the right hand corner—there is a piece of this mud that way, lying down on the ground. It was frozen in on the ground and it [234] was laying up against the side. Instead of taking a trowel and getting that mud out—I told Mr. Gothberg to go around and saw a hole—so they had only to push their finger in there and push it out so this beam would fit in there.

Q. That is the way it is now?

A. Yes, on the lower part of the beam—it is cut out for this piece of mud that they pushed out with their fingers.

Q. And is it that way now—in the ladies' restroom? A. Yes.

Q. So that the jury may see it, if they go there, to inspect it? A. Yes.

Q. Now, No. 17: "Installed and laid cement block in freezing weather without properly protecting the wall, and allowed the mortar between the blocks to become frozen, and the wall is dangerous and

(Testimony of Burton E. Carr.)

apt to disintegrate." Now, there has been so much testimony about that I won't ask you much, but I will ask you to state if there has ever been repair or anything done to it by Mr. Gothberg, since you served this notice on him?

A. None of that has been repaired. Of course, he did repair the chimney, but the City got after me on it—so the City made me tear down the chimney because the blocks—you could pick them out with your hands. They were loose and so the [235] fellows wouldn't work around this chimney at all because it really was dangerous.

Q. And the city inspectors caused that to be done?

A. Yes, so I told Gothberg he had to remove it and he said it would be all right in the spring of the year—he would guarantee the chimney—and I said if somebody got killed I would be stuck. It was in a wavy condition when they cut a hole for the chimney—they didn't cut the hole square so they had to bring their block this way and twist it to go up.

Q. In fact, it is not cut perfectly plumb—the new one?

A. The rest of the blocks, on a lot of occasions, are the same way now. They are all loose all the way around where they were frozen and didn't adhere—some did and some didn't.

Q. The same amount of mud was used in the chimney in laying it up as was used in the walls?

A. Yes, the same thing.

(Testimony of Burton E. Carr.)

Q. Then, as I understand it, there has been nothing done to correct this wall?

A. No, nothing.

Q. Now, No. 18: "Failed to insulate the water pipes, steam pipes and sewer pipes, as provided in the contract." Did they do any insulating of those pipes at all?

A. Yes. They insulated some of them and most of them are not [236] insulated at all—the same on these pipes, if you notice, in the showroom when you go there. None of those pipes are painted. In fact, it calls for painting the pipes, too, before insulation—and none of them were painted.

Q. Is there any insulation on those pipes?

A. Some there is and some there isn't. In the showroom, all around those heater units, there was no insulation at all—and the steel that's coming down—that was supposed to have been painted in the show room. The two places on the left hand side, as you go into the building in the showroom—they are unpainted.

Q. Do they have any coat of paint on them at all?

A. No, except factory priming—was all.

Q. No. 19: "Failed and refused to take out, reinstall and refinish one section of the cement floor in the showroom which was frozen during construction, and is defective and will not stand." Has he done anything about fixing that?

A. No, that shows up by that big window as you go into the door—by the gas pump—the door next

(Testimony of Burton E. Carr.)

to the office as you go into the first door on the right hand side. There is a space there several feet—and several feet back it was all rough. In fact, the floor was so rough that we put, I don't know, how many coats of paint to try to smooth the floor out—but it's too rough to hold any of these tiled blocks we were putting on there. [237]

Q. Was it your intention to use tile floor there?

A. That's what my intention was if we had a smooth job.

Q. Now, No. 20: "Refused to correct a condition in the floor of the boiler room so that it would drain properly, even though requested so to do." When did you talk to him, if at all, about that boiler room before you served this notice on him?

A. I talked to him several times about it wouldn't drain—because we had to go in the boiler room ever so often to draw the muddy water. We had to clean the boiler regularly—all the water runs to the side of the stairway—and it is about at least an inch and a half or two inches of water in the boiler room.

Q. Has that ever been corrected? A. No.

Q. How many times did you talk to Mr. Gothberg about that ?

A. I talked to him every time and I told him about it every time. He called up and he wanted his money for the building—and I told him when that is completed, well, we would pay him.

Q. Did he ever make any effort to fix it?

(Testimony of Burton E. Carr.)

A. He never made any effort.

Q. 21: "Failed to replace cement blocks over rear windows in shop where the mortar was frozen in installing them and had fallen out over and around the windows, leaving [238] a dangerous condition and causing a waste of heat from within." Has he ever done anything about that?

A. No, that there is the place where they mention about this stove pipe going through the window. The only time that operates is when they are steaming motors and no heat comes out of there to amount to anything—but all along the ledge where this big reinforced beam is supposed to be—I don't know if there is any in there or not, but that is sagged down to the center. You can stand there and look through that and you can see right through it. Also, there are several places upstairs—if you look right you can see right through to the outside.

Q. Mr. Carr, has there ever been any great amount of heat in your little stove there?

A. No, not too great. We use that for steam cleaning cars—and it starts up and we do our steaming and shut it off. In fact, in most places—with those steam plants—they use them right in the garage and they don't have any smoke—but if they get the wrong mixture it does create smoke, but there is no heat.

Q. It is more of a vent pipe, then, than it is a heat pipe? A. Yes.

Q. 22: "Failed to properly install all of the

(Testimony of Burton E. Carr.)

windows in the shop, same being still loose and improperly fitted." Are they in that condition yet?

A. Well, that is the bottom parts of the windows. I was up there last year and they wiggled back and forth. I told him about it and he put some putty around there, I guess, and you know how long they will last.

Q. Is the putty stained or not?

A. It is there, but if somebody would walk up there and shake the windows, I imagine it would shake loose and fall out.

Q. 24: "Has attempted to make an extra charge for moving the steel beam over the electric door, which beam was set at the wrong place by the plaintiff, and through no fault of this defendant, and said plaintiff has constantly demanded extra pay for correcting an error in installment by him." Now, would you explain that to the jury?

A. Well, this electric door—it wasn't the door he ordered originally he told me—so he had to make his own change there because the beam isn't much of a job to change—just two poles here and two poles here — just execute those poles — pull this back—only about 20 minutes would be plenty of time to move this beam back.

Q. How wide is the door?

A. It is about 12 by 12, approximately.

Q. And your steel is in sections of twelve feet, is it?

A. Yes, it is twelve feet for the entrance of the

(Testimony of Burton E. Carr.)

door, and there is approximately twelve feet the other way—tying the steel together. [240]

Q. And that is the matter referred to in No. 24, is it? You have explained that?

A. Yes, it was set at the wrong place—because if he ordered the right hardware for it—it called for an electric door—he was supposed to furnish, and if he ordered the right one it would have fit in without any trouble. But he couldn't get that and he ordered something else, which was no fault of ours. I don't know whether the door was a better door, that we got, or a poorer—I don't know—but it didn't specify any type of hardware—but that's what we got.

Q. Were you to blame in any way for changing that beam?

A. No, the door fell down two or three times while they were trying to make it work.

Q. Does it work all right now? A. Yes.

Q. 25: "The floor in the garage was carelessly and negligently built so that it does not drain, and the work in finishing the floor was not in a workmanlike manner, but is defective and causes large pools of water to stand on the floor, following the time that vehicles with snow on them, or water, are brought into the garage." I believe you explained that this morning. A. Yes.

Q. Now, 26: "Failed to furnish the walls in the men's restroom." [241] Would you explain that to the jury?

A. Well, that was just a regular concrete block—

(Testimony of Burton E. Carr.)

the one wall—I wanted that also covered but he wouldn't cover it so that's just the way it was. We had—I believe we had—yes, we had to paint that ourselves—that wall.

Q. Now, 27: “Refused to allow credit for 77 cement blocks saved by a change in the plans as to the installation of the south door to the garage, which blocks were of the value of 65c per block.”

A. It was somewhere around that—I couldn't say for sure. One of the type of block was 55c—and the other one was 65c—but it seems to me those were 65c.

Q. Did he haul the blocks away from there?

A. Yes.

Q. Now, then, 28: “Failed to install proper exhaust pipe with swivel of a manufactured and recognized product, according to contract.” Would you tell the jury what was done instead of what was contracted to be done?

A. It was just a homemade deal up there—it's all homemade—the whole thing. In fact, we used it a few times and it would break off—and we would have to go up there with a ladder and get one of the fellows to fix it—and pretty soon it broke off again—and finally they have quit using it altogether.

Q. And those have never been installed by him?

A. No, not a manufactured article that it calls for.

Q. And these homemade things were not workable?

(Testimony of Burton E. Carr.)

A. No, I told him that when he put them on there—and the City told him.

Q. Now, 29: “Attempted to charge and refused to remove from the statement for extras the doors leading to the show room as such doors were included in the original contract, and the attempt to collect for these doors was arbitrary, capricious, and without any justifiable reason.” Now, would you explain that? What doors do you refer to there?

A. The three doors where he is supposed to have made a block wall—that was a fire wall in between the office and the other. He didn't put the block wall in but he used lumber and that is where the doors are supposed to come in—at that place—and the door he used was just a one-way door—and we should have a swinging door with all that hardware, which he never put on—and then the sliding door is not the right hardware he is supposed to have.

Q. And that fire wall was never put in?

A. No.

Q. Now, No. 30: “Failed to furnish and properly install doors with closing equipment on all outside constructions as required by the contract.” Would you explain that to the jury? [243]

A. Well, when he first started to put them on I told him—he told me he didn't have the hardware to put them on the inside—but he would put them on the outside temporarily. I said, “I would rather have you leave them off instead of drilling some holes in there and have to drill double holes later.”

(Testimony of Burton E. Carr.)

He said, "I just can't get the hardware," and he said he would just put them on temporarily, and later on he would put them on the inside because he knew by putting them on from the outside that the cold weather—they wouldn't work—in fact, the front door on the outside was frozen last winter—and we couldn't open it or close it and it froze. We couldn't use that door at all—we could only use one of our front doors.

Q. Did he ever fix that?

A. No, he never did.

Q. I will ask you about 31: "Failed to use heavy wire mesh in gas pump lanes as called for in the specifications." Now, I believe I have asked you about that. Now, 32: "Attempted to and did insist on charging for extras for installing of a hoist, which was included in the contract." Is the hoist you mention here in No. 32 the one you just showed us the picture of?

A. The identical same one—the hoist was ordered before Mr. Gothberg signed the contract. Bjornstad and Clark—they ordered it and I showed him the specifications of the whole [244] thing because we wanted him to build the building—so we showed him the specifications—just exactly what we were putting in there—so when he come to install the hoist he lost the specifications, and we had to have Bjornstad and Clark wire Seattle to have it shipped up immediately so we could install it.

(Testimony of Burton E. Carr.)

Q. Was the hoist in town for several months before it was installed?

A. I wouldn't say several months—it was in town for perhaps some time.

Q. This next one, 33: "Failed to install the mirrors in the restroom." Did he ever do that?

A. Well, I wasn't there when he brought the mirrors, but Jack Akers said he just laid them down there and just took off—so they installed them themselves—that's what he told me.

Q. That was done after you sold the building?

A. Yes.

Q. Now, 34: "Laid cement blocks in sub-zero weather without heat or enclosure in violation of the terms of the specifications and contract, and the mortar was frozen and is soft and of no benefit, and the blocks are loose and caused the building to become unsafe." We have referred to that one enough, I think. Now, 35: "Failed to finish the building at the specified time, to-wit, December 1, 1950." Now, how much later was it than December 1st that he actually [245] claimed that he had the building finished?

A. Well, there was two deals in there—one reason I wanted the payroll on that—there was some extra work we had him do and some of the work that he was supposed to do. In fact, he didn't have the door in when we moved in there—I mean that's when we had all of our stuff in there—on the 15th of February. We couldn't do any work because

(Testimony of Burton E. Carr.)

we couldn't use the door—the door wasn't hooked up so it worked.

Q. When did he get those doors to work so that you could actually use the building?

A. That must have been a week and a half or two weeks afterwards.

Q. Was it as much as March the 1st?

A. It was around March when we had our notice in the paper for opening—it was around March.

Q. Then, I believe you stated in this notice that he failed to finish on December 1st—and he did not go ahead with it so you could use it—until February 24, 1952. Is that about right—about February 24th?

A. Well, it could be somewhere around there because we had a lot of stuff to install and put in; in fact, we had to install the washmobile ourselves—I mean assemble it together. Gothberg was supposed to assemble it but we assembled the tracks on it—and assembled the washmobile. [246] In fact, we assembled everything—and I paid \$175 extra for the plumbing part of it—but he was supposed to assemble it—but we did.

Q. He never did assemble it?

A. He never did assemble it, no.

Q. Mr. Carr, I believe Mr. Gothberg testified that while the plans did call for a railing on the stairs, that that could not be put in on account of the condition of the building. Is that true?

A. The railing could have been put in there just the same because you have a railing when you

(Testimony of Burton E. Carr.)

walk down the stairway. There is plenty of room for it.

Q. Did you ever talk to him about installing the railing?

A. I talked to him about it but he stated he didn't need it—but we were paying for it.

Q. And the specifications and plans called for it?

A. Yes, and he never give us any credit for not putting it in.

Q. How about air compressor—did he put that in right?

A. It calls for it down in the furnace room—but he claimed there was not enough room for it, so he made a place to set it on. He just built the platform is all—so he didn't attempt to set the machine in place; in fact, this machine was setting up on the floor—moving it around on this frozen ground—and I hoisted it up because moving it so many times—I was afraid that it was going to get broken and we needed it—so he didn't attempt to hook it up so I had to hook it up myself.

Q. How much did you pay for the pipe?

A. I was billed \$6.00 or something—they marked it for air compressor—Anchorage Installation Company. I wanted them to give me the pipe and charge Gothberg and I would install it—but he said no, you will have to pay for that yourself—so we have a bill there that says for the air compressor.

Q. It was \$6.00 and something? A. Yes.

Q. You installed it yourself? A. Yes.

(Testimony of Burton E. Carr.)

Q. Do you know how much it cost you to install it—for labor of your own men?

A. I did it personally—except one of the fellows helped me put it in place—but I spent about an hour or an hour and a half on it, I guess—to hook it up.

Q. Did the specifications, as initialed by Mr. Gothberg, provide for his installation of that air compressor? A. Oh, yes.

Q. And did it provide for a little hole, or whatever you call it, in the basement where the heater is? Did it provide for that?

A. There was supposed to have been a place for it but, for [248] some reason, when they put the stove in—they got so many pipes hooked around that they didn't have enough room to put it in—but I imagine if the pipes had been put in properly, there would have been plenty of space for it.

Q. Did the specifications call for it to be placed in that building? A. Yes.

Q. Did the specifications clearly call for the building of the walls, and the floor, and the cover over the little room for the heater plant?

A. Yes, that's right. On one of those plans there—where he initialed it—for that cement slab on the top—that's part of the floor.

Q. Is there any extra cement slab on there—or is it a slab of the floor?

A. It is a slab of the floor with reinforced steel.

Q. A slab of the steel with reinforced steel?

A. Yes, but it called for it in the specifications.

(Testimony of Burton E. Carr.)

Q. It was all set down in the plans?

A. Yes, it shows a picture—and he initialed it.

Mr. Bell: You may take the witness.

Court: Counsel for plaintiff may examine.

Cross Examination

Q. (By Mr. Arnell): Mr. Carr, in response to Mr. Bell's questioning about [249] Item 20, which is about the floor of the boiler room, you said you had talked to Mr. Gothberg several times about this particular item. Is that not correct?

A. You will have to read the item—I don't know what 20 is.

Q. That relates to your complaint about the floor in the boiler room—that it was not level.

A. Yes.

Q. Did I understand you correctly to state that you had talked to Mr. Gothberg several times about this?

A. Yes, I did.

Q. Did, on any of these occasions, he ask you for money or demand payment of these other amounts that were due?

A. The way he demanded his payments—he was supposed to have had a bond——

Q. Just answer my question.

A. Well, you will have to ask the question again.

Mr. Arnell: Would the reporter please read the question?

Reporter: "Did, on any of these occasions, he ask you for money or demand payment of these other amounts that were due?"

(Testimony of Burton E. Carr.)

A. Yes, he did.

Q. And you didn't pay him, did you?

A. He wouldn't tell me how much the complete amount was—and he wouldn't give me a statement—he said it was too much work. [250]

Q. Do you mean to imply to the jury that you had not received statements before that?

A. I didn't receive any complete statements on it until March the 4th of this year—and he called me up and said he was going to sue me—I said, "Gothberg, you will have to sue me for the simple reason I don't know how much I owe you," and he said, "I know how much it is—it's \$18,000.00." I said I wasn't paying \$18,000.00 without a statement. I said, "You mail the statement," and he said, "It's too much work."

Q. Yesterday you offered in evidence a statement, showing a bill on the foundation of approximately \$3,900.00? A. Yes.

Q. Do you mean to tell the jury that you never got other billings similar to that, for the progress of the extra work?

A. This foundation deal—the City was paying——

Q. Just answer my question. Do you mean to imply to the jury that you never got periodic billings for this other work?

A. There might have been—but not on the extras. I never did get billing on the extras until March the 4th.

Q. You mean to state, then, that you never got

(Testimony of Burton E. Carr.)

a bill of any kind other than the final bill that was given to you, as you say, in March?

A. Complete bill, no,—March the 4th.

Q. But did you get interim statements prior to that? [251]

A. I got odds and ends—the one for moving the foundation—we got that.

Q. Did you get interim billing regarding the finishing work for any interior of the show room?

A. I don't remember off hand what we got—I would have to see the bill—identify the bill.

Q. Mr. Carr, you are familiar with these plans and specifications. Did I understand your testimony yesterday to be to the effect that Mr. Gothberg's contract included the furnace room in the sub-foundation work?

A. I want to ask a question—what do you mean—what part of the contract—the first part or the last part, or what are you talking about?

Q. Well, are there two parts to that particular phase of this building?

A. Yes, the first part was moving the foundation back—and there was a second part to the regular contract.

Q. What phase of the work did this written contract cover?

A. The original contract?

Q. Yes.

A. Whatever he put his signature on it—the dotted line there—what he signed for.

Q. Do you mean the contract on May 25th included both phases of the foundation work?

(Testimony of Burton E. Carr.)

A. How do you mean? [252]

Q. You just informed the jury that there were two phases to this foundation work. I am trying to find out if the contract signed in May included both phases, according to your version?

A. No, there was two separate contracts.

Q. Then, the May 25th contract, Mr. Carr, included only the moving of the foundation back, and reconstructing the extra twelve feet—is that not correct? A. Yes, that's right.

Q. Well, now, when did the furnace room come up for discussion?

A. Well, you see—if you will let me explain this thing a little—the City——

Q. Answer my question.

Mr. Bell: Let him answer it.

A. I am answering it in a way that they can understand me. The way you are trying to twist me around——

Mr. Arnell: I am not trying to twist you around. I am trying to get at the meat of this thing.

Court: You can answer his question first and then explain.

A. It never did come up for discussion at that time.

Court: Now, if you want to make an explanation, go ahead. This is about the furnace room?

A. Yes. This foundation—the City gave me a permit to put a foundation—that is, a regular foundation down—and so we set that down in place and I was figuring on putting the [253] furnace

(Testimony of Burton E. Carr.)

room back of the front foundation because I had 140 by 50 feet—so I could have working space—so when the City made me move back that ten feet—and I had to take twelve feet on account of this steel I had already bought—so we had to move back twelve feet. Well, I had to take it in where I wanted to put my furnace room—but the furnace room was supposed to be on the outside and we had to change it and put it in on the inside of the building—and the City was going to pay for this change—so I wanted this foundation moved from the front to the back—and the two walls was supposed to be put in—that's in the furnace room and that was to be charged to the City—so I could keep the bills one to the other. But the top was not put in—I mean that was part of the regular contract.

Q. Well, did I understand your testimony, Mr. Carr, to be that, under the original May 25th contract, all Mr. Gothberg was to do was to move the foundation back, in accordance with the requirements of that plan—twelve feet?

A. Plus putting in those two places, which would be extra work, which would take about two yards of cement and cost around \$14.00 or \$17.00, I believe.

Court: Will you repeat the last part. He was to move the two walls, front and back, and what else?

Mr. Carr: And then when they was pouring this concrete, they would have to pour—only one wall would be poured. You see, [254] the whole concrete

(Testimony of Burton E. Carr.)

was down between six and seven feet, so we had to pour a back wall, anyway, so that would be two extra feet down where this boiler room goes, and then they had to make one extra wall—that would make it four walls. I mean it had to be this way, anyway, so all they had to do was put in a wall here, and here up to the staircase—a short wall here and a long wall here—but I agreed to take care of that because we were going to charge that to the City because that was expense they made me incur.

Court: I think we will suspend. The jury, during the recess, will remember the admonitions of the Court as to duty. Court will stand in recess for 10 minutes.

Thereupon, the court recessed at 4:02 o'clock, p.m., until 4:12 o'clock, p.m., at which time the following proceedings were had:

Court: Mr. Carr may resume the stand. Counsel for plaintiff may proceed with examination. The record will show all members of the jury present.

Q. Mr. Carr, Plaintiff's Exhibit No. 3, which is BCG 1, is on the board there, and I ask you now, whether that was the only plan of the foundation that was available on the 28th day of May, 1950, at the time the written contract was signed?

A. I never got a copy of that particular one, but I had a copy made of it just a few days ago.

Q. What is the date on that plan—it is down in the lower right hand corner.

A. April 5th, 1950.

(Testimony of Burton E. Carr.)

Q. Were there other plans available at that time, regarding the foundation or basement?

A. No—yes, there was. This was made for quite sometime—this plan was made when we had the steel made—I mean this part in here—this was traced from another plan.

Q. I know, but were there any other plans pertaining to the building as it was finally constructed, available at that time?

A. At that date, I couldn't tell you. The plans were in the progress of being made at that time. You can look at the date on the next plan there, and that would give you the date they were made.

Q. At the time this contract was negotiated, or signed, did you discuss it personally with Mr. Gothberg—the first contract?

A. Yes.

Q. Did he have this exhibit at that time? Did you furnish it to him?

A. I believe there was kind of a pencil deal that was made out—it could have been the same one—I wouldn't say for sure, but that would be exactly the same—that was the first contract. [256]

Court: What is that—plaintiff's exhibit?

Mr. Bell: It is Plaintiff's Exhibit 3 and it is marked BCG 1.

Q. Mr. Carr, calling your attention again to Plaintiff's Exhibit 3, there is a cross section of the foundation and also the corners there—now, according to that plan, how deep was that foundation to be built into the ground?

(Testimony of Burton E. Carr.)

A. When that foundation was put in the first time——

Q. Just answer. How deep does this plan call for, for the foundation to be constructed in the ground?

A. I will tell you—it was put in on a cost plus basis. I was forced by the city engineer to get this certain contractor for putting it in, so it cost me so much money I had to fire him—so originally they went down about six feet.

Q. At that time, did you think it was necessary to go down six feet?

A. They told me they had to be sure they was down to good gravel—but they should have stopped a little sooner.

Q. Was that on the original foundation, constructed by Breeden and Smith? A. Yes.

Q. Did you consult with Mr. Anderson when Plaintiff's Exhibit 3-C was prepared?

A. This is Number 1, isn't it?

Q. That's right. Did you consult with Mr. Anderson at the time [257] that was prepared?

A. Yes. I want to withdraw something—Breeden and Smith made the plan first out of his own plan—and Mr. Anderson copied the plan—also his plan—and that's this one here—a copy of it. Breeden and Smith made their own plan and this is a copy—because when we had this here plan made, we sent out and bought the steel to fit the building—and we had the steel come up to fit the building.

Q. Mr. Carr, sometime during the course of this

(Testimony of Burton E. Carr.)

trial, you have testified that the old portion of the foundation went down six or seven feet, is that correct? A. Yes, that's right.

Q. Now, on Plaintiff's Exhibit 3, which is BCG 1, what is the depth of the foundation, including the footing?

A. You mean when Breeden and Smith put it down?

Q. No, after the plans were revised and provisions made for the extension of the building, and moving the front back. According to that plan, how deep was the foundation and footings supposed to be?

A. The same depth because the plan that he had there shows how to connect the front portion. They cut that off—and then they moved that part ahead and poured the concrete. But that is supposed to be the same depth—otherwise you couldn't secure it.

Q. Will you come down to the exhibit, Mr. Carr, and point out [258] to me where the depth of the foundations is shown to be six or seven feet?

A. I couldn't tell you on that, no. We are going by the original contract so it was supposed to be the same as before—in the same position—look the same, and everything else.

Q. Will you point out the cross section of the foundation and footing to the jury there?

A. Here. It was here originally.

Q. The cross section or the face view of it?

A. What do you mean, cross section?

(Testimony of Burton E. Carr.)

Q. Well, those pictures each show the thickness of the wall and the depth of the foundation?

A. I am not familiar with building—I am not a building contractor—I am a garage man.

Q. According to this cross section, the depth of the foundation is three feet, and the footing is two feet—is that correct? A. I don't know.

Court: The witness should not be pressed for an answer if he doesn't understand those drawings. If the exhibits show what counsel's questions imply, why, that can be shown to the jury by some other witness or perhaps the exhibit itself will show it.

Court: Mr. Bell, did you intend to put this check in as [259] an exhibit—the check payable to Alaska Engineering Supply—a check for \$2,700 and some odd dollars? If not, you better reclaim it.

Mr. Bell: Absolutely. I forgot to offer it. May I offer it now, even though it be out of order. The purpose of offering it is to fix the date.

Mr. Arnell: I have no objection.

Court: It may go in as Plaintiff's Exhibit K and may be considered read. It has been read—part of it.

Mr. Bell: Mr. Carr read it.

Q. Mr. Carr, you have a drawing before you marked BCG 5, and which is the same as Plaintiff's Exhibit 4-D? A. Yes, that is BCG 5.

Q. And what is the date of that?

A. That is 7-5-50.

Q. And what does that plan purport to represent?

(Testimony of Burton E. Carr.)

A. That is to represent a portion of the building.

Q. Well, what portion?

A. That is the engine room—the boiler room.

Q. Did I understand your early testimony to be of the effect, Mr. Carr, that at one time you intended to put the boiler room outside of the building?

A. At one time, yes.

Q. And then, as a result of the action of the City in requiring you to move the building back, you had to redesign the [260] building and provide space for the boiler room inside—is that correct?

A. Yes.

Q. How deep, according to the plan, does the boiler room have to be, Mr. Carr?

A. Well, I don't know if there is any figure here—I know the other one was about eight feet.

Q. Is there a footing underneath the foundation wall, also, around the furnace room?

A. Well, what's a footing? If you could point it out to me I could tell you.

Q. Well, your footing, Mr. Carr, would be this wider portion of that wall here.

A. Oh, yes. I see now.

Q. Is there provision for a footing on that drawing?

A. Yes.

Q. And how high is the wall?

A. You mean from the top to the bottom?

Q. Yes.

A. I see a figure here of nine feet, four inches from the bottom of the footing at the top of the wall—I mean to the lower part of the slab.

(Testimony of Burton E. Carr.)

Q. Mr. Carr, do you admit or deny that the work required by Plaintiff's Exhibit 4-D, which is BCG 5, is an extra?

A. As I explained to you—it is an extra. [261]

Court: Can you answer that yes or no?

Mr. Carr: Yes, it is an extra—part of it—not the whole thing.

Court: You may explain.

Mr. Carr: It says on the contract that the walls as now in place—it meant that the walls he put in—I think it originally was \$2,500, and something, for the original contract—and this is extra work to be added on.

Q. Now, when you refer to the extra work—

A. That is to put in one building wall—eight feet—and then partially the other way that goes to the stairway.

Q. In other words, would there be two full walls the length of the boiler room, to be extras?

A. No, the reason they put this wall in the same time—if we had to put the regular foundation in and then put this in afterwards—we would have had to cut up that foundation again—so we decided to put those two walls in at one time.

Q. Now, Mr. Carr, the difference in depth between the first plan and this No. 5 that you have before you, would be extra, would it not, so far as the two outside walls are concerned?

A. Only on that one corner, I believe—that engine room is about eight feet square—it seems to me—it could be smaller or larger.

(Testimony of Burton E. Carr.)

Q. Actually, including the stairway, is it not about 14 feet [262] on the one side—17 feet?

A. Yes, you're right.

Q. The stairway would be an extra then, would it not?

A. No, it wouldn't be. That would be included in the regular contract because I just wanted those two walls put in so it wouldn't interfere with the rest of the building.

Q. Are you referring to the two outside walls or the two inside walls?

A. The two inside walls. It would be easier if I would point it out on the board, I believe. Of course, I know you know.

Q. Do you want to step down?

A. Yes. This foundation here was here—and we moved it back—well, the wall that comes through here was filled in the same time. This wall here was—and this had to be deeper and this had to be deeper—and this wall from here to here—and then back into here. This is a short span here—so this would be about twelve feet—then, the way it looks, it would be 12 by 12—or 12 by 8.

Q. Then the boiler room did constitute an extra—at least partially so? I mean for finishing the boiler room?

A. Mr. Gothberg initialed the slab on this one here for the slab and the stairway.

Q. When did he initial BCG 5, which you have before you, Mr. Carr?

(Testimony of Burton E. Carr.)

A. He didn't initial this one—it is the one that we have then, [263] I believe.

Q. Well, was that initialing done at the time the contract was signed?

A. It was done at the time the contract was signed.

Q. In other words, September 19th would be about the right date for the initialing?

A. When the contract was signed.

Q. Well, were not all of the fittings and the foundation—and the boiler room walls and the boiler room stairway in on that date?

A. Well, I couldn't tell you—the only thing—just the walls are all I can remember. The stairway could have been in—I wouldn't say for sure. I don't remember seeing it.

Q. The outside walls were in?

A. Yes. And this wall was up to the stairway. The stairway could have been in—but the agreement was just to put in these two walls.

Q. Then all of the additional excavation—the depth of the outside walls and the two inside walls—was all done at the time the contract was signed. Is that correct?

A. You mean the second contract?

Q. Yes.

A. Yes, that was all done.

Q. They were also done at the time Mr. Gothberg initialed Plan No. 5, were they not? [264]

A. It wasn't completed.

Q. Perhaps not 100%.

(Testimony of Burton E. Carr.)

A. No, this portion of this wall—so that we could pour them in together—so that it would be solid.

Q. Well, Mr. Carr, do you admit now, or deny, that you owe Mr. Gothberg some additional money over and above the \$2,542.00 for this extra work?

A. I admit I owe him some—but not \$1,600.00.

Q. When you got the \$3,900.00 statement, did you ever ask him for any explanation of the additional charge?

A. I don't remember. I know there was an extra charge on there, but I didn't know just how much it was going to be.

Q. Do you mean to state that you expected some additional charges, after you received the \$3,900.00 bill, as a result of this particular work?

A. No, I didn't expect any more than that \$3,900.00—that was plenty high for doing that work.

Q. Did you object to the \$3,900.00 bill, or did you accept it?

A. Naturally I didn't accept it because I didn't pay it.

Q. Did you dispute it?

A. One reason we didn't pay it was because we wanted to present it to the City for causing us all this here trouble.

Q. Did you ever send a bill to the City in the amount of \$4,000.00—whatever this amount that is due is? [265]

A. I don't remember. We have been going round and round on that deal—and they finally

(Testimony of Burton E. Carr.)

offered me \$1,310.00 for the whole deal—that's what they want to pay me for it.

Q. Yesterday, Mr. Carr, Mr. Bell went into your employment of the architect, Mr. Anderson, and you said that Mr. Gothberg recommended him to you? A. That's right.

Q. Did he actually recommend him—or did he suggest his name, among others?

A. No, he recommended me to him—and besides he was the one that looked me up—and Gothberg brought him over to the house.

Q. Now, you testified that you paid Mr. Anderson, or Mr. Smith, or both of them, approximately \$2,700.00 in November and you have introduced a check to that effect? A. Yes.

Q. What does that payment represent?

A. Well, that payment represents—he told me that he would either be there himself all the time—and if he was not able to he would have a man on the job every day until the job was completed.

Q. Was this \$2,700.00 supposed to represent architect's fees for drafting plans, and also inspection fees?

A. That is the way I understood it.

Q. You paid him in full, then, on November 8th—about sixty [266] days before the building was actually completed? Is that correct?

A. Right.

Q. Why did you do that?

A. Well, he wanted his money.

Q. Is it not a fact, Mr. Carr, that the payment

(Testimony of Burton E. Carr.)

that you did make to him was in payment of his fees for drafting the plans and the specifications only?

A. Well, he drafted them—and he give me the bill—how much it was. I asked Gothberg and he said the plans were O.K.—that everything was all right so I went and paid him—so as long as he was satisfied with it—and he agreed that he was going to inspect the building, which he didn't.

Q. When you paid him \$2,700.00, did you expect him to render any more services, and inspect the building during the process of construction?

A. Oh, yes.

Q. Did he render those services later on?

A. Not that I know of—maybe once or twice, but that's all.

Q. Did he ever discuss anything with you in regard to the building, or any changes?

A. Well, no, he didn't say too much about it. Usually our conversation was over this heat in the building, because the fellows couldn't work—that was a big argument about the thing because I was worried about the blocks being [267] frozen and cracking up.

Q. Did he continue in a supervisory or inspector's capacity until about January 10th or 15th of 1951?

A. Well, I never did at any time discharge him from the job.

Q. In other words, he was continuing then to act as an inspector on the building?

(Testimony of Burton E. Carr.)

A. Well, he never showed up. I didn't have to discharge him—he just didn't show up.

Q. You were handed this morning, by Mr. Bell, Plaintiff's Exhibit 7, which was a letter signed by Mr. Anderson, approving certain changes. The letter, as I recall, was dated December 28th. Did you discuss any of those changes with him?

A. No, I didn't discuss it, but it was dated in December—and part of the work was already in—I didn't see Mr. Anderson to talk to him about it—and it was just between I and Gothberg—and Gothberg evidently had put those changes in.

Q. Your testimony is that you never discussed these proposed changes with Mr. Anderson, and knew of his approval or disapproval?

A. I talked with Gothberg about it.

Q. You never talked to Mr. Anderson?

A. I don't believe I did.

Q. Mr. Carr, under the plans and specifications, was any finish [268] work required of Mr. Gothberg in the show room?

A. You mean finish carpentry work?

Q. Yes. A. No.

Q. What would include the paneling and the framing of the doors?

A. We paid for the finishing work—the Husky Furniture Company — between \$2,700 and \$2,800. Mr. Gothberg did some, too.

Q. What work did the Husky Furniture Company do there, Mr. Carr?

A. They put up all of the panels and did all the

(Testimony of Burton E. Carr.)

panel work. Mr. Gothberg—he put all the heavy beams around in there—two-by-fours and two-by-sixes—and he put the ceiling on.

Q. Did he also install the finish material on the ceiling—or did Husky Furniture do that?

A. I believe Mr. Gothberg did that—he put that on. We paid for the material though—I bought the material previously.

Q. In other words, all of the work that was done in the show room was extra—is that correct?

A. I wouldn't say all because some of that there called for blocks—that fire wall there. I was led to believe by Mr. Gothberg that I was to pay for that myself until I begin reading the specifications—and so I had to buy the fire board and I paid for it myself. It is supported by four-by-eights for fire protection along the side—but after [269] reading it I found out he was supposed to furnish that himself.

Q. The original plans and specifications called for——

A. Brick.

Q. Some kind of a block partition?

A. Yes.

Q. Who changed that?

A. Mr. Gothberg gave me the impression that that didn't include any there until I found it out afterwards—until it was completed.

Q. When did he give you that impression?

A. At the time he was building the other part.

Q. Have you been billed for the wood partition that was put in there?

(Testimony of Burton E. Carr.)

A. Yes, I have been billed for that.

Q. Are you mixing up the partition with the other finished work, Mr. Carr?

A. It would be pretty hard. I have hired a lot of men—it would be hard for a carpenter to segregate his work—what he was supposed to do, because I was paying for the heat and the water that he was supposed to—because he didn't have all of his completed. He told me he did but he didn't. I don't see how he could segregate it.

Q. Mr. Carr, we have introduced all the statements submitted to you. Have you examined those to determine whether or [270] not you have been charged for this partition wall?

A. I am not a carpenter—but I am going to have one tomorrow to possibly find out what footage is in there, and see what the bill is.

Q. I am trying to find out if you think you have been charged for the partition, as distinguished from other work that is an extra.

A. I am not saying if I did or if I didn't. It's pretty hard to say until we figure it out. The way the rest of the building is, I am in doubt one way or the other.

Q. Did the extra work in the show room, done by Mr. Gothberg, include installation of all the ceiling joists, as well as the finish work on the ceiling?

A. Yes, he did all that.

Q. It included, then, putting in the back framework, and studs, and everything all around the entire interior, did it not?

(Testimony of Burton E. Carr.)

A. Well, on that wall—I don't see how you can regulate it.

Q. Well, he did put in the studding for the walls there, which Husky Furniture came along and put on the paneling?

A. I don't know. Does studdings run up and down, or back and forth?

Q. Up and down.

A. Yes, all the studding was on that one wall there. I didn't know at the time but he was supposed to put that in with blocks. I would rather have it block—if I knew there [271] was blocks there at the time.

Q. You are referring to the partition?

A. Yes.

Q. How about studding along the west wall, and north wall, and east wall?

A. Well, that studding—Mr. Gothberg put in on the north wall—there isn't much studding there—mostly all glass.

Court: We will suspend at this time. The trial will be continued until tomorrow morning at 10:00 o'clock. You may step down. Ladies and gentlemen of the jury, the trial of this case will be continued until 10:00 o'clock tomorrow morning so you will be excused to report at 10:00 o'clock in the morning. In the meantime, you will remember the admonitions of the Court as to your duty, and you may now retire.

Whereupon at 4:57 o'clock, p.m., September 24, 1952, the trial of the above entitled cause was con-

(Testimony of Burton E. Carr.)

tinued until 10:00 o'clock, a.m., September 25, 1952.

Be it Further Remembered, That at 10:00 o'clock, a.m., September 25, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: If the parties to this case now on trial desire [272] to offer amended pleadings, I wish they would be filed at the earliest convenient time so that note may be taken of them in the instructions. As far as I know, it will be necessary to suspend this trial at 3:30 this afternoon, to take up a criminal case and a long deferred argument in a civil case of pressing importance. The witness, Mr. Carr, may resume the stand, and counsel for plaintiff may proceed with examination.

Q. (By Mr. Arnell): Yesterday, Mr. Carr, we were talking about the finish work that was done inside the show room, and we got around to the question of the partition. How high was the original partition to have been built, according to the plans and specifications that are in evidence?

A. Well, I don't know exactly—but it would have to be at least twelve feet, because if that is a fire wall in there—the twelve feet would come up to the bottom of the beam, more than likely. According to City ordinance, it would have to be all the

(Testimony of Burton E. Carr.)

way up—it would have to be built in accordance with the City ordinance.

Q. Do you know what the plans called for as regards to the height of the partition?

A. I couldn't say—I know it was to be according to the City ordinance because we built the other all the way up to the ceiling—twenty-four feet.

Q. When you say the partition should have been twelve feet, [273] are you stating that to be a fact, or is it your opinion?

A. It is my opinion. I believe it should be up twenty-four feet because that's where we put it now.

Q. What is the height from the floor to the steel beams?

A. Twelve feet—no, it would be twelve and five about eighteen feet.

Q. Actually, according to the plans, Mr. Carr, that partition was to be constructed only eighteen feet from the floor, was it not?

A. I couldn't tell you that—but in order for a fire protection it would have to be all the way up.

Q. Was it to be a fire wall, or just a partition?

A. That was a fire wall.

Q. It definitely was to be a fire wall?

A. Yes.

Q. Now, at that time, Mr. Carr, do you admit or deny that you owe Mr. Gothberg for the costs incurred by him in roughing the show room?

A. Well, some of this is extra work. I admit some of the work is extra—but I don't admit I owe anything because the damage on the building is

(Testimony of Burton E. Carr.)

about three or four times the amount they are claiming—so I don't owe Mr. Gothberg anything.

Q. What do you think your indebtedness is to him by reason of this particular extra work, irrespective of the claim [274] you have for damages?

A. Well, every day, sitting in here, more and more piles up because now another thing came up that probably the building may have to be tore down, and I am not sure.

Mr. Arnell: Miss Keeney, will you read the question? And I ask that you answer the question.

Mr. Bell: I believe he has answered it.

Court: The question may be read.

Reporter: "What do you think your indebtedness is to him by reason of this particular extra work, irrespective of the claim you have for damages?"

A. Well, right now it would probably run around about \$40,000.00—the way I can figure it out—with the information I have this morning.

Mr. Arnell: I move that the answer be stricken and the witness be instructed to answer the question. It is not a responsive answer.

Court: The reporter will read the question again.

Reporter: "What do you think your indebtedness is to him by reason of this particular extra work, irrespective of the claim you have for damages?"

Mr. Carr: I don't quite understand.

Court: What extra work do you refer to, Counselor?

(Testimony of Burton E. Carr.)

Mr. Arnell: The extra work we have been discussing in this show room. [275]

Court: The extra work involving the partition?

Mr. Arnell: No, it is not the partition, your Honor. I will try to rephrase the question.

Q. As I understood your testimony yesterday, Mr. Carr, it was to the effect that Mr. Gothberg roughed in the show room, including the ceiling, is that correct? A. Yes.

Q. Do you now admit that all of that work was an extra, and that it was not included within the terms of the contract?

A. At that time it was figured as an extra.

Q. Well, is it still regarded as an extra?

A. Not exactly, no. As I say—I don't owe Mr. Gothberg any money on that.

Court: It is not a matter of whether you owe him anything or not. The question is what would be the value of that, in your opinion, as an extra?

Mr. Carr: I really don't know because I have a carpenter down there this morning figuring now. I couldn't answer that question—what the amount would be.

Q. Mr. Carr, do you recall that your deposition was taken before Miss Keeney on the 28th day of June, 1952? A. Yes, I remember.

Q. Do you recall testifying, at that hearing, in regard to this particular extra work?

A. I recall some what I said. I don't know if I recall all [276] but you ask me and I will answer it.

Q. Do you recall that I asked you the follow-

(Testimony of Burton E. Carr.)

ing question: "Yes, assuming that the building was completed, as you say it should be?" and your answer, "Oh, I think the finishing up inside was around \$5,500.00, I believe, if I remember right now." Do you recall that?

A. I recall that. That was the bill that Mr. Gothberg sent for extra—it was approximately that amount—I wouldn't say to the exact penny, or the exact dollar.

Q. Then I asked you the following question—does the Court have the deposition?

Court: What page, Counselor?

Mr. Arnell: Page 14, your Honor. I am sorry—at line 4.

Q. I asked you the following question, after you gave me the answer that I have just read: "Q. When you say the inside, is that the show room?" and your answer: "A. That's the show room." Do you recall giving that answer to that question?

A. Well, that would be the show room—that is the show room and the offices together.

Q. Then at line 6, page 14, of that deposition, I asked you the following question: "And you would owe that?"—and your answer reads: "I would owe that—and then the foundation—I would owe that." Do you recall that answer?

A. That is on the foundation on the City—I don't know what [277] foundation you mention there on that—I don't recall.

Q. Well, were the answers that you gave at

(Testimony of Burton E. Carr.)

that deposition hearing, regarding the inside work costing about \$5,500.00 correct, or is it wrong?

A. It is correct.

Q. Well, then, your testimony today should be that the cost of the extra work inside the show room is practically \$5,500.00 or the amount Mr. Gothberg claims, is that correct?

A. Well, it was the amount that Mr. Gothberg claims.

Q. Well, Mr. Carr, Mr. Bell introduced yesterday an invoice which was admitted as your Exhibit G, and a part of that invoice there was an extra, designated "sign post". Mr. Carr, you have been handed Defendant's Exhibit G.

A. I remember that yesterday.

Q. Was the material and the labor for the sign post an extra? A. Yes, it was.

Q. In other words, the sign post was not included as a part of the plans?

A. No, it was not included as a part of the plans.

Q. Would you describe for the jury, Mr. Carr, where that sign post was located, with reference to the front of the building?

A. The sign post was stuck out straight from the building. It was not facing on the building—a very short piece of [278] steel there—I think about four-inch pipe—and, let's see, how long it is—it doesn't say how large it is. It is \$18.00 for the pipe.

Q. To what, inside the building, was that steel pipe attached, Mr. Carr?

(Testimony of Burton E. Carr.)

A. I wouldn't know that—whether it was attached to the blocks, or how it was attached.

Q. Do you mean to imply to the jury that it was just shoved into the concrete block in between them?

A. The way the rest of the work was done, I wouldn't doubt it.

Q. Isn't it a fact that that pipe was attached, in some way, to the steel beam that has been discussed?

A. It should be attached to something there.

Q. I didn't ask you if it should be. I asked you if it was not a fact that it was attached originally?

A. I don't know whether it was attached, or just pushed in there—I wouldn't know.

Q. Is it not a fact, Mr. Carr, that there are two steel beams in that front?

A. I couldn't answer you that—I know what I ordered and Mr. Gothberg had a drawing of the steel beams that was furnished—and he could read on the blueprint just what was furnished.

Q. Is it not a fact, Mr. Carr, that one of the steel beams carries the marquee, and there is another beam that carries [279] the roof?

A. The whole structural steel that carries the roof is the one I ordered from Seattle, and had it delivered on the property—and that was all there—and the part of the building is part of the contract—and that beam you mention is part of the contract because that is part of the building.

Q. Then there are two beams—is that correct?

(Testimony of Burton E. Carr.)

A. There may be three or four hundred beams on the whole structure.

Q. Well, there is one beam that carries the marquee, is that correct? That is the one you pointed out to the jury yesterday?

A. That is built in with the marquee—that's part of the marquee.

Q. And isn't there another beam over and above that, that carries the roof?

A. Yes, not a beam—a whole lot of beams together carries the roof.

Q. I realize they are all tied in together, Mr. Carr, but there was another beam that had to be purchased by Mr. Gothberg, wasn't there?

A. I knew he had to purchase all material I didn't furnish.

Q. But when you signed the contract, you represented to him that all of the structural steel was on the site, or at least available? [280]

A. The structural steel—what I furnished—was on the site.

Q. Well, if the second beam were not there, would it not have been included in the steel that you represented as on the site?

A. Would you mind asking me that question again, please?

Q. If the second beam were not there, would it not have been included in the steel that you represented as on the site?

A. It would be included on the site because that

(Testimony of Burton E. Carr.)

was part of the original contract—the same as the rest of the timbers.

Q. Mr. Carr, though under the specifications that were agreed to be a part of the contract, it specifically stated that you were to furnish the steel, did they not?

A. Oh, no. The steel was on the sites of the building, but there is other pieces of steel, too, that Mr. Gothberg furnished to hold the steel and pieces of wood—it is all one piece—just like anything else, you have got to have something to hold it up there—you just can't stick it up there in the air on sky hooks.

Q. Mr. Carr, you testified yesterday that Mr. Gothberg called off—I don't know—it says here 70 or 100 pumice blocks, that you never received credit for. Did I understand your testimony correctly?

A. I didn't say 70 or 100—I said he hauled off some blocks. I bought all the blocks for the building myself—practically all of them. [281]

Q. When you say “practically all of them”, would you state for the benefit of the jury how many?

A. I haven't the information right here, but I probably could get the information—but pretty close to around 3,000—more than that. I made two purchases of blocks—quite a large stock of them—and Gothberg hauled some in—and he didn't put the ones that was supposed to have gone in the fire wall.

(Testimony of Burton E. Carr.)

Q. Under the heading, "Special Conditions", there were 3,250 8 by 8 by 16 standard pumice blocks on the site. Is that correct?

A. There was quite some number—more than than—but the architect said he would get the number down a little bit. Oh, yes, I see—approximately 3,250 8 by 8 by 16 standard.

Q. And those are designated as Bullnose and Double Bullnose? A. That is right.

Q. In similar quantity? A. Yes.

Q. Do those figures represent the approximate number of blocks that were on the site at the time the contract was signed?

A. Yes—and that was on the property—and Gothberg knew it was on the property—and everything else extra he was supposed to furnish—all the lumber and material—and it says so in the contract—and he signed it.

Q. In other words, if there were extra blocks needed, he was [282] supposed to furnish them?

A. Yes.

Q. Mr. Carr, do you know how many blocks were actually put into that building?

A. No, I wasn't interested in that. I was interested in what the building was going to cost me.

Q. Is it not a fact Mr. Gothberg furnished approximately 1500 more blocks?

A. I wouldn't know whether it was 1,500—or 15—or 5,000—I wouldn't know.

Q. Would that figure be approximately right?

A. I couldn't tell you.

(Testimony of Burton E. Carr.)

Q. Do you think that that entire building was constructed of the blocks that were represented in the specifications, or did it take more?

A. I don't know that that has anything to do with this steel.

Court: Whether it has anything to do with it or not, answer the question.

A. I know it took more, but I wouldn't know how many.

Q. Did it require more blocks, Mr. Carr, than you have been claiming credit for from Mr. Gothberg, because of these blocks you say he took away?

A. Well, I couldn't hardly say that—I wouldn't know—I don't know just how many he took away. I know he took quite a bunch away in the truck.

Q. How many blocks were saved by cutting a door in that south wall?

A. I couldn't tell you that off hand.

Q. Approximately how many?

A. I am not a builder—but it was 8 by 8, and they are 16-inch blocks, so it could be figured out.

Q. According to Item 26, Mr. Carr, in the demand you claimed credit for 77 cement blocks at 65c a block, which equals \$50.05 for the blocks that were saved by cutting the door. I presume that is the one in the south wall—is that correct?

A. I imagine that was it.

Q. Is this 77 the number of blocks credited, according to your estimation?

A. I had somebody else figure that out so that is the figure they gave me—approximately what it

(Testimony of Burton E. Carr.)

would run—probably that is the reason it is down there.

Q. Did it take more than 77 blocks, over and above the total specified in the specifications, to complete the building as it now stands?

Mr. Bell: Object to that question. He has answered it three times in three different ways that he doesn't know.

Mr. Arnell: Three different ways?

Mr. Bell: Yes, sir. The same question has been asked in three different ways and he answered each time that he doesn't [284] know. Object to the question as repetition, and irrelevant, immaterial and incompetent.

Court: The objection is overruled. The witness may answer if he knows. The question will be read.

Reporter: "Did it take more than 77 blocks, over and above the total specified in the specifications, to complete the building as it now stands?"

A. I really don't know just how many blocks it took to complete the building, because I didn't figure it out—I wouldn't know that question.

Q. You have been handed Defendant's Exhibit E, Mr. Carr, which is the check in payment of the bill to Anchorage Installation.

A. Yes.

Q. I ask you—what did that work cover?

A. Well, that covered the pipe that was put in too small—and they had to tear that down and put in the pipe right.

Q. When you say that the pipe was put in too

(Testimony of Burton E. Carr.)

small, or smaller than required by the specifications, will you please, Mr. Carr, turn to the specifications concerning these particular pipes concerning the size of the pipes to the washmobile?

A. I think it's two-inch pipe. Mr. Gothberg knew that before he hooked it up, because I gave him the plans and he lost them. [285]

Q. What did the specifications call for?

A. Two-inch pipe. It calls to hook up the washmobile—and it took two-inch pipe—and he put half-inch pipe or inch.

Q. Where was the location of the washmobile originally established?

A. I planned to put it just about—oh, it would be about 20 feet further away than it is now. It is cheaper to put it where we did than it was previously—and we never got the credit for the pipes.

Q. Then it is your testimony that, according to the original plans and specifications, it was 20 feet away from where it is presently located?

A. Yes.

Q. Now, who ordered the work done that is involved in this payment here?

A. Well, I ordered the work done. How do you mean—the work done—for changing it back to this other position?

Q. Did you order the change made?

A. Yes, I ordered the change made to change it to a different position, but it didn't take as many pipes as originally.

(Testimony of Burton E. Carr.)

Q. Did you make that change order after you had entered into possession of the building?

A. I don't understand you.

Q. Did you ask Anchorage Installation to change these pipes after you moved into the building? [286]

A. Yes, that's when we were moving into the building at the time—and the washmobile wouldn't work on one-half or three-quarter inch pipe—and it takes two-inch pipe.

Q. Then you ordered the change, is that correct?

A. Yes, I ordered the change, but it wasn't hooked up according to specifications—and they had to change it—and Gothberg wouldn't change it.

Q. Can you point out in the specifications, Mr. Carr, where the hookup did not comply with them?

A. I can't point out to where the specifications said to hookup the washmobile rack—in fact, we had to assemble it ourself.

Q. The washmobile was assembled, was it not, or at least located?

A. Yes, it was located where we figured on—but we assembled it ourself.

Q. You changed the location, did you not?

A. No, just for the water pump—there is about 240 pounds water pressure for that pump that feeds this washmobile.

Q. Did you order Anchorage Installation directly to make the change, or go to Gothberg?

A. I went to Gothberg—and he wouldn't do anything about it.

Q. When did you go to him?

(Testimony of Burton E. Carr.)

A. When I tried to hook it up.

Q. When was that? [287]

A. That was the time they was trying to hook the pump up.

Q. When was that?

A. When we was moving in the building.

Q. Sometime in February?

A. No, it was after the 15th of February, because we moved in there, and it wasn't hooked up—it was quite awhile after that.

Q. Mr. Carr, I hand you a document and ask you to examine the signature, and state whether or not the signature is yours? A. Yes, it is mine.

Q. Would you recite what the document is?

A. Well, it increases the size of the water line.

Q. Don't state what it says—just state what it is.

A. Well, it is about the washmobile—and I had to sign it under protest in order to get into business.

Q. You did sign that order for extra work?

A. I had to do it. They tore all their pipes out before they asked me to sign it—and I didn't have no water around—so what was I going to do?

Mr. Arnell: I wish to offer it in evidence.

Mr. Bell: No objection.

Court: It may be admitted, and marked Plaintiff's Exhibit 12, and may be read to the jury.

(Mr. Arnell then read Plaintiff's Exhibit 12 to the jury.)

Mr. Carr: May I ask a question? [288]

Mr. Arnell: Go ahead.

Mr. Carr: Was that \$170.00? I believe that check

(Testimony of Burton E. Carr.)

we wrote to Anchorage Installation was \$175.00—and we got this check here to Anchorage Installation.

Mr. Arnell: It's right before you, I think.

Mr. Carr: Yes, that is \$175.98—and that's what we paid Anchorage Installation, so evidently — I don't understand that. This is the bill and I believe I had the other one at the time; otherwise we would not have paid that.

Q. Now, yesterday, Mr. Carr, you testified regarding the payment of another bill from Anchorage Installation, in the amount of \$285.00, I believe.

A. Yes.

Q. Do you recall what that check was in payment of?

A. No, I don't recall what it was in payment of. I know there was—and I say there was one tank for the residence—and the Anchorage Installation was \$245.00, I believe, but I don't recall what that was for.

Q. Did you order that work done?

A. I ordered some work done in there for air pipes—but it couldn't be that much money just for putting in two air pipes in there.

Q. Did you testify yesterday it was for change of location of the water line, or something?

A. I don't recall. [289]

Q. What was requested to be done to the air lines?

A. The air lines was according to specifications. They was to be a certain amount of footage of air lines going to the washmobile—and there was a footage of air lines to go to the lube rack. We run down

(Testimony of Burton E. Carr.)

the wall—I imagine the pipe would be approximately 60 to 80 feet, one-half inch pipe—and it wouldn't run that much money at 20c a foot.

Q. Did these air lines run both to the hoist and the washmobile? A. Yes.

Q. And the lines ran, then, through the compressor, did they not? A. Yes.

Q. Were these additional lines required by the change of location of the compressor?

A. From the washmobile to the compressor?

Q. Yes.

A. Well, that would be shorter—the way they are hooked up now than if the compressor would have been down in the basement where it should have been.

Q. According to the original plans, is it not a fact that the compressor was to be along the west wall of the building, approximately in the center?

A. I believe that was supposed to be located in the boiler room—the compressor. [290]

Q. Mr. Carr, would you mind stepping down a moment, please?

What does the top line represent here, Mr. Carr, with reference to your building?

A. Would you point that top line out?

Q. What does this represent?

A. That represents the west wall, I believe.

Q. Would you examine the designations along that wall, there, on the drawing, and state to the jury **what you find?**

Court: Before you answer that question, I wonder

(Testimony of Burton E. Carr.)

if anybody can say whether the cardinal points of the compass are indicated on the plan. Do you see south, north, east, or west anywhere?

Mr. Arnell: No, your Honor, they are not—not to my knowledge.

Court: The question may be read.

Reporter: "Would you examine the designations along that wall, there, on the drawing, and state to the jury what you find?"

A. Well, well—if you tell me what I am looking for I can point it out to you.

Q. Do you find the location there for the compressor? A. Yes, I do.

Q. Where is it?

A. On the west wall, right in front of the hoist.

Q. Is that the original plan as to the location of the compressor? [291]

A. Well, evidently this is the original plan, but I asked the architect—I wanted that located in the boiler room. Evidently he put it here, but I didn't know he put it here—but where we have got it now, it is really closer because it is sitting right back in here—and all the pipe line and everything to the washmobile are back down in through here—and all these lines go through this wall—and I would say it took less——

Q. Would it be closer, also, to the hoist?

A. Oh, yes—only ten feet.

Q. You had it run around the locker room, did you not, or the chimney?

A. No, we run it up on one wall.

(Testimony of Burton E. Carr.)

Q. And then back down?

A. Yes, just a matter of a few feet.

Q. Did you order this extra work done for the compressor?

A. I believe Gothberg mentioned it—I think at the time he figured it it was supposed to be in the furnace, because he mentioned there wasn't enough room in the furnace—and he would have to build a stage by the stairs.

Q. Did you call Anchorage Installation, or did you call Mr. Gothberg, regarding this particular extra charge for the air lines?

A. Well, the Anchorage Installation—when they was hooking up [292] the air lines up to the top of the compressor, they wouldn't hook the compressor up—and they just ran an air line to the top of the ceiling—and we had to hook it from the top of the ceiling down to the compressor—and Mr. Gothberg wouldn't do that. I went to Anchorage Installation and told them that I wanted that charged to Mr. Gothberg, and they said no—they wouldn't do it—so it is on the bill there for the pipes I bought for the air compressor.

Q. When did you talk to Mr. Gothberg about it?

A. I told him several times I wanted that done.

Q. Do you want to return to the witness chair, Mr. Carr, please? Do you recall when you ordered that work done?

A. Yes, I recall when I asked for the work done.

(Testimony of Burton E. Carr.)

Q. When was it?

A. When was it?—I couldn't tell you the date.

Q. Is it your contention, Mr. Carr, that this was not extra work, but was within the terms of the contract?

A. It was partially extra, yes.

Q. What percentage of this \$245.00, that you paid, would be extra, according to your contention?

A. Well, when they hooked the air lines up they didn't hook it anywhere near the pump—they hooked it as far as the ceiling—so I told him while he was hooking it up to run them over to the—let's see—that would be to the west [293] wall—to run them down the west wall toward the center, and over across the building, and over to the other wall—and that is just for the extra pipe—to hook it in those two places.

Court: You haven't answered the question, Mr. Carr. What in your judgment, what percentage of this total amount would be considered as extra work, not included in the contract?

Mr. Carr: Two hundred and some odd dollars.

Court: What percentage of that would you consider extra?

Mr. Carr: Well, that would be kind of a hard question to answer—but that amount of that check—I don't know. I don't know if that included some other stuff, but I can tell you this—that two-thirds of the air lines that I ordered—I ordered two-thirds of the air lines, if that would help you out—there's about one-third there, and about two-thirds, I would say, was extra work.

(Testimony of Burton E. Carr.)

Q. I hand you another document, Mr. Carr, and ask you if you can identify it?

A. Is this a price here of \$6.70?

Q. No, that is the order number. Does your signature appear on that document?

A. Yes, it does. They wouldn't have got that much money if I knew that was just for the air lines.

Q. Did you sign that work order, then?

A. Yes, I signed that work order—but at the time I signed it, [294] I didn't know it was for that, because they certainly wouldn't have got that much money for about 60 feet of half-inch pipe.

Mr. Arnell: We offer this in evidence.

Mr. Bell: No objection.

Court: It may be admitted and marked Plaintiff's Exhibit 13, and may be read to the jury.

Mr. Arnell: Mr. Bell has agreed to waive reading of it, your Honor. It may be submitted to the jury without reading.

Court: Very well—whatever counsel stipulate to.

Mr. Arnell: Just to speed this thing up a bit.

Court: Is there any amount on it?

Mr. Arnell: \$248.07 is the amount of the bill.

Mr. Bell: Object to that—I don't see any such thing on there—maybe it is——

Court: Show it to counsel.

Mr. Bell: Oh, that is an order—24807.

Mr. Arnell: The order number is up here.

Mr. Bell: That doesn't indicate an amount of money at all.

(Testimony of Burton E. Carr.)

Mr. Arnell: It says amount—the amount is spelled out.

Mr. Bell: Well, it will be agreed, before it is shown to the jury, that this writing in here was not here when he signed the order, won't it?

Mr. Arnell: I don't know. [295]

Mr. Carr: It wasn't.

Mr. Bell: So that it won't be confusing to the jury, I ask that that be stricken because that has been put on there since, because it is a typewritten instrument signed by him, and that is in pencil or pen that he says wasn't on there when he signed it. I will object to its introduction unless that is taken off.

Court: Who wrote that?

Mr. Carr: I don't know—because the pipe was 20c a foot and the labor for hooking it up—they wasn't working there more than half an hour.

Court: Now, whose handwriting is that, if you know?

Mr. Carr: I think that probably was done yesterday, or in the last few days, because that ink looks very, very new. I find it here, is all.

Court: Just answer my question. Do you know whose handwriting that is?

Mr. Carr: No.

Court: Is it yours?

Mr. Carr: No.

Court: Or your wife's?

Mr. Carr: Oh, no.

Court: Was there anything of that kind on the order when you signed it?

(Testimony of Burton E. Carr.)

Mr. Carr: No. [296]

Court: Is that your signature?

Mr. Carr: Yes.

Court: The jury will disregard the writing on it—the writing in pen and ink. Mr. Carr signed this and he said it is a work order. It is a work order for extra work, and the date of it—and that is typewritten—and his signature there, of course, should be considered by you—but you should not consider the matter in pen and ink. You said you didn't write it, Mr. Carr?

Mr. Carr: No.

Court: So that is not part of the order at all.

Q. Mr. Carr, if this was not extra work at the time you signed the work order, why did you sign it then?

A. Just like anything else, of course. I am a garage man, but when you order something done, you sign for it that you want it done. You wouldn't know exactly, when you order something, how much it is going to cost—and you sign your name that you want it done.

Q. You regarded it as extra work at the time, or you wouldn't have signed the order?

A. Yes, I knew that was extra work—that wasn't on the contract billed to me direct—not that price, though.

Q. Mr. Carr, how much of the fixtures were you to furnish in this building—the equipment?

A. What kind of equipment? [297]

(Testimony of Burton E. Carr.)

Q. Were you to furnish the hoist?

A. Yes, I was to furnish the hoist.

Q. You were to furnish the compressor?

A. Yes.

Q. And the washmobile? A. Yes, sir.

Q. And all equipment of that nature?

A. Yes, all that.

Q. You testified yesterday that this equipment was all in Anchorage prior to the completion of the contract, is that right? A. Yes, it was.

Q. Where did you have it?

A. I had it down to the Alaska Railroad—it was stored down there at the Alaska Railroad.

Q. Where?

A. At the Alaska Railroad shops.

Q. At the shops?

A. Well, down at the Alaska Railroad. I don't know just where it was—I knew where I picked it up.

Q. Did you pick it up?

A. I don't know whether I picked it up personally, or some of the help—I don't recall.

Q. When did you pick that up?

A. I can tell you approximately about what time—in this manner—the time Mr. Gothberg didn't have the building enclosed, and he had a canvas over part of the door, and the frost was practically about, oh, I would say three or four feet deep on the floor—and we moved them down and it kicked around for quite awhile, and if I remember right, Mr. Gothberg—I hauled it up, so I can prove it was sitting there

(Testimony of Burton E. Carr.)

for quite sometime. And the compressor and all that stuff was hauled down there at the time—I told him I didn't want it put there—I was afraid somebody would tamper with it.

Q. Who did the hauling for you?

A. I don't know if we did it ourselves, or hired it done—I couldn't tell you.

Q. Do you have records that would show that?

A. I would have the records if we hired somebody—I mean if we called the transfer—if we didn't we hauled it ourself.

Q. Would you bring those records in court this afternoon?

A. I have one record here in my pocket. I thought you might ask about that—I will tell you the reason I can't bring them all in is——

Court: We will take a recess. It may be on the table. The jury will remember the admonitions of the Court as to duty, and the court will stand in recess for 10 minutes.

Thereupon, the court at 11:05 o'clock a.m., recessed until 11:15, a.m. o'clock, at which time the following proceedings were [299] had:

Court: Without objection, the record will show all members of the jury present. The witness, Mr. Carr, may take the stand again, and counsel for plaintiff may proceed with examination.

Q. Mr. Carr, in ordering this extra work done directly through Anchorage Installation, did you have any saving as a result of that?

(Testimony of Burton E. Carr.)

A. I don't understand what you mean by "saving".

Q. If you had Mr. Gothberg order the work done, and had him billed directly for it, would he be entitled to charge 10% of that amount, over and above the face value of the bill?

A. I wouldn't know if there would have been any difference or not, but it wouldn't have been that much if Mr. Gothberg did it.

Q. Being an extra outside the scope of the contract, if he had been billed directly for the work he would have been entitled, would he not, to charge you 10% of that amount?

A. Yes, he would—but they billed me for it.

Q. Then you did have the saving of 10% by going direct to Anchorage Installation?

A. I didn't ask them to bill it to me.

Court: So far as I am aware now, the trial of the case will not be continued tomorrow. Other matters have been scheduled that must be taken up. [300]

Mr. Bell: I think, your Honor, we can finish. We have Mr. Rivers, the engineer here, and naturally his testimony will take a little longer than a normal witness.

Court: I merely make this announcement so that counsel won't plan on going forward with the trial tomorrow. When we finish today, we will have to put it over until Monday.

Mr. Bell: All right.

Q. Yesterday, Mr. Carr, you testified regarding some changes in the northeast corner of the build-

(Testimony of Burton E. Carr.)

ing. Would you explain again what changes were ordered by you?

A. I don't recall that question yesterday. What do you mean?

Q. Was the type of construction in the northeast corner of the building changed during the progress of the work?

A. I don't remember just what you mean. You would have to point it out to me.

Q. I believe you testified yesterday that, with respect to the changes to the front of the building, you went up and talked to both Mr. Gothberg and Mr. Anderson about them, did you not?

A. I don't know what changes you mean.

Mr. Bell: Mr. Arnell, to refresh your memory, I believe it was concerning the windows.

Court: Is counsel referring to windows instead of wall?

Mr. Arnell: Windows are only part of the wall, your Honor.

Q. Mr. Carr, what was the original design of the north and [301] northeast side of the building?

A. Let's see—the northeast—yes, I remember that now. That was pumice block through there, and then the blocks all froze and they fell out—so as long as they had to be torn out completely, why, we decided to have some extra work in there—putting in two plate glass windows instead of that roll of blocks—and then I changed the gas pump.

Q. Mr. Carr, is it not a fact that the original de-

(Testimony of Burton E. Carr.)

sign of the building, by the use of concrete blocks, would not carry the marquee?

A. Well, yes it would, because we put a heading across there that was extra work—I agree it was—putting the blocks and putting the heading with reinforced steel—that would carry the—

Q. Well, by that, Mr. Carr, do you mean to tell the jury that from the foundation you went up to this beam with concrete blocks or pumice blocks?

A. It was pumice blocks.

Q. And when you say you had a beam across the top, do you mean a lintel of reinforced concrete? That was a reinforced steel beam across the top?

A. That was a reinforced steel beam across the top, yes.

Q. Which, Mr. Carr, was poured first—this lintel or beam that you refer to or the concrete pillars?

A. I believe they was all poured at the same time. [302]

Q. Well, then, the lintel was not in place, was it?

A. I don't know what you mean by lintel.

Q. The concrete beam across the top.

A. I admit that beam across the top, over the windows, that that was extra work that had to be in there to protect the windows, because that was really stronger than the pumice block underneath.

Q. Then did you have to change your design in order to properly support the marquee and make it safe?

A. No, because that was the same deal.

Q. Would the pumice block carry the weight of

(Testimony of Burton E. Carr.)

the concrete slab across the top, as well as the marquee?

A. Well, I will tell you—I am not an engineer and I had an architect to figure that out—and so he would have known on a deal of that kind. I don't know just how much one will take and the other one will take—I wouldn't know, no.

Q. Do I understand your testimony, then Mr. Carr, to be that you admit that all of the changes, with respect to the type of construction, constituted extras?

A. The changes was exceptions there.

Q. What, under your contentions, are exceptions?

A. Well, those blocks was put in there—and naturally I was charged for the amount of blocks that was put in the building. And those had to be torn down—and there should be credit for the amount of labor that he put on that corner—[303] and we had to put in the windows—in fact, they are frozen now.

Q. Is it not a fact, Mr. Carr, that the front of that building was included within the original contract—that is, the \$38,000.00 contract?

A. Well, all the building is the \$38,000.00 contract.

Q. Well, then, whether the blocks were torn out or not, wouldn't make a great deal of difference, would it, because they were originally included within the general contract?

A. Well, is was included in the general contract—

(Testimony of Burton E. Carr.)

and we paid for the general contract, plus all the extra work of putting this other stuff in.

Q. But the other is definitely extra, is it not?

A. No, because he had to do his work over again. It wasn't good.

Q. Wasn't your testimony, a moment ago, that you changed the type of building, as distinguished from the workmanship?

A. We changed the type of structure.

Q. Well, if you changed the type of structure, it is an extra, is it not?

A. I did tell you that it was an extra—a certain percentage.

Q. I believe, yesterday, you claimed that there should have been some saving as a result of the substitution of glass for block. Is that right? [304]

A. I don't remember.

Q. I understood your testimony yesterday to be that there would have been some saving by reason of the substitution of glass for the blocks. Is that correct?

A. I believe so—for your labor—laying the blocks and all—I believe there would. I don't know if it's right or not.

Q. How much did those blocks out there cost per block to lay?

A. I have no idea what they would cost.

Q. Well, was the going price approximately \$1.10 per block, laid in place?

A. I never questioned what it cost for the blocks.

(Testimony of Burton E. Carr.)

Q. What was the cost of glass per square foot at that time?

A. I wouldn't know that either.

Q. Was it \$2.75 a square foot?

A. I couldn't tell you—I couldn't tell you what the glass runs.

Q. Mr. Carr, I now hand you Plaintiff's Exhibit No. 9. Would you state—did Mr. Gothberg present a statement to you, Mr. Carr, covering these extra charges?

A. The only time I got that was on March the 4th, 1952.

Q. You had never heard of any charges prior to that time?

A. I probably have, but I never seen nothing like this until that time.

Q. Didn't you receive a progress billing, or notice, as the work went along, or as it was completed?

A. The only thing is we paid him on several occasions.

Q. Were all of the items, listed in this exhibit, Mr. Carr, extras, within your understanding?

A. Well, he has them here down as extras, but it would take quite a little checking to find out if this here really went into the building.

Q. Well, to the best of your knowledge, do the items set forth in that exhibit constitute extras, irrespective of the accuracy of the amount?

A. Well, there is quite a lot on there—some of them I see is all right—others, it is doubtful.

Q. Which one of the items is doubtful?

(Testimony of Burton E. Carr.)

A. Well, something on everything is doubtful—because you know a lot of this thing is covered up like the steel in the contract. I wouldn't know if that steel is in there or not—sometimes I doubt it—that's what is doubtful—things I can't see.

Q. You can see the items that are set forth in the statement?

A. I can see the items.

Q. Are they all extras?

A. He's got them marked down as extras.

Q. Well, are they all extras, according to your understanding?

A. They are extra, but not according to my understanding.

He's got them marked down as extras, but there is a lot of that that is on the regular contract. [306]

Q. Which of those items is on the regular contract?

A. For instance, the hoist—that's one thing.

Q. What else?

A. Well, about this molding—and some of that molding, I told Gothberg I didn't want it on there—and I wouldn't have it on there—and he put it on anyway. It's homemade stuff—it looks bad—if you change glass you've got to tear it all apart. It is not manufactured stuff that it's supposed to have on there, and I wouldn't pay for that stuff—I don't want it.

Q. What else?

A. There's a number of things.

Court: Go as far as you can identify them. Take

(Testimony of Burton E. Carr.)

them up, item by item, and tell which you think are, and which are not.

Mr. Carr: Number A—the door, that's agreed on; on Capital B—just the two plate glass, but the molding is so inferior I wouldn't agree on it—I didn't want that installed.

Q. Is that the glass that was put into the wall as a result of the change of construction?

A. That's right. And the next item, Capital C—that's all right; and Capital D—relocating the pumps, that's correct. And E—installing two-plunger hoist, that is not correct.

Q. You mean it is not correct as to amount or—

A. No, that's part of the contract to install that hoist. He [307] had a picture of it before he even signed the contract—and he lost the plans and the picture and all—the same as he did his check.

Q. Would you go on with the next item. Mr. Carr?

A. F—increase the height of the glass to seven feet, that's correct, but the labor—six hours—well, that was installing the molding—but installing that molding—I wouldn't pay for that stuff and Gothberg—let's see, that's very doubtful on Capital G there. They didn't spend 62 hours putting that in—I know positively.

Q. What is that?

A. Beam and three-column concrete—five yards, including pouring, lumber, framing, and rods, and buttons, and steel—185 pounds of steel. I don't know

(Testimony of Burton E. Carr.)

if that was in there or not—if there was any steel in there.

Q. Is that concrete beam the one you described that your ordered put in to replace the blocks?

A. That's right—I ordered it put in. Labor—framing—62 hours for just putting in a beam of that size there—about 8 feet—let's see—18 feet—about that high and about so wide—and 62 hours—I think that's out of reason.

Q. Well, the framing includes the posts, too, does it not, as well as the beam?

A. It doesn't say on here about any posts.

Q. Doesn't that statement also show a charge for concrete? [308]

A. Well, you are correct—beam and three column concrete—well, that could be correct, except the steel.

Q. Are there other items on there, Mr. Carr?

A. I would like to see the bill for that steel for that particular date.

Q. Are there any other items on there, Mr. Carr?

A. There is Capital A—credit for one window.

Q. Is there any other credit shown there?

A. Mulls and covers—I don't know what that is, and there's 29 cinder blocks credit—and this glass—I guess that is the glass that was supposed to go in the back door, I believe.

Court: Is that a credit or a charge?

Mr. Carr: Credit. I don't know—is that 29 feet of cinder blocks, or is it 29 cinder blocks?

Mr. Arnell: I think it's 29 feet, Mr. Carr.

Mr. Carr: That's \$31.90 for cinder blocks to go

(Testimony of Burton E. Carr.)

into an eight-by-eight wall—there is one front door—that is a credit, and 23 feet of cinder block—another item here, \$25.30, too, and 94 feet of cinder block, \$102.40.

Court: Are those credits, or charges?

Mr. Carr: Credits.

Q. Mr. Carr, disregarding the accuracy of the figures, is all of the work represented on that exhibit, work that constitutes extras done by Mr. Gothberg, outside of the scope [309] of the contract?

A. It is marked as extras.

Q. Was that type of work done out there?

Mr. Bell: Object. He has answered each piece separately, and answered what was done on the contract, and what was extra. To ask him to answer more questions that contradict his former testimony would be improper.

Court: The objection is sustained.

Q. Mr. Carr, I hand you Plaintiff's Exhibit H, which constitutes the bill for extra work. The first item is enlargement of washroom. Is that a proper extra charge?

A. You say, was that a proper extra charge? Is that the question?

Q. I don't mean as to amount, Mr. Carr, but as to work. Was that work beyond the scope of the original contract?

A. This was extra work.

Q. Now, about the extension of the concrete ramp?

A. Wait until I get down that far here. Let's see—that was that ramp in front of the building on

(Testimony of Burton E. Carr.)

the north side—that was extra work—it was ordered extra work.

Q. Did you order that? A. Yes, I did.

Q. Now, the next item is moving iron beam, which is the beam that was located adjacent to the large twelve-by-twelve door; I believe your testimony, yesterday, Mr. Carr, at [310] least I understood your testimony to be, that Mr. Gothberg made a mistake and put the beam too close to the track of the door. Is that correct?

A. I wouldn't say he didn't make a mistake in putting it there.

Q. Did he put the beam, in the first place, where it was fabricated to be put?

A. He put the beam where it was fabricated to put, yes—but the door that he was supposed to have ordered—he said they never shipped him the right door he ordered, and the right hardware for the electric door—so he had to change that beam, there, so the door would work—so that is part of the contract, to install the door.

Q. Isn't it a matter of fact that the specifications called for a twelve-by-twelve door?

A. I believe that's what it was.

Q. The type or make of door was not specified, was it, particularly? It was the size that was established by the specifications?

A. The only thing—I went up to his house and he showed me a picture of different doors that I wanted.

Q. Is it not a fact, Mr. Carr, that the door, which

(Testimony of Burton E. Carr.)

we are talking about, as it was fabricated, was only ten feet from the door and from the wall?

A. As it was fabricated, yes. There are several types of [311] doors that could fit in there that would work without taking them out.

Q. And your door track would have to go about that? A. That is correct.

Q. Is that beam approximately the same height as the top of the door?

A. Approximately twelve feet, the beam is.

Q. Is it possible, Mr. Carr, to get a sliding door of that type, that will run on a track, that is not level at the top?

A. There is all types of doors you can get. You can get doors to run over the top of that—or underneath it.

Q. That is the kind, then, that you wanted him to put in?

A. That was up to him to figure out—he knew the specifications in the contract—and it was up to him to figure out what type of door to order.

Q. Actually, he had to move this iron beam we are discussing back two feet, did he not?

A. Two pulls, and push it back two feet, that's all.

Q. Yesterday, Mr. Carr, you described to the jury the condition of the garage floor; were you there at the time the floor was put in?

A. When it was put in?

Q. Yes.

A. I wasn't there all the time. They worked on it at night [312] time and I stayed there up to about

(Testimony of Burton E. Carr.)

11:00 o'clock one night—and they was working—but it takes a long time to smooth that off.

Q. Working at night on concrete is not an unusual occurrence, is it? A. I know it.

Q. In other words, when it is poured, they sometimes work around the clock, if necessary?

A. That's right. I understand that.

Q. What is the pitch of that concrete floor, Mr. Carr?

A. I don't recall right now. It's supposed to be enough so when water is on the floor, it's supposed to run toward the drains, but it runs away from the drain—some of it might, a little bit, but it runs all over the shop.

Q. Were you there before the concrete was poured?

A. I was there practically all the time, watching them.

Q. How were the strut boards installed?

A. I don't know what that is.

Q. Well, were there any boards used to bring the concrete down to a level pitch, or grade?

A. Well, yes, they had kind of a board—you mean for leveling it off? You mean when I testified that there was a bunch of two-by-four's laying there, and he picked up the straightest one, and used it as a level to sight the floor off? [313]

Q. Mr. Carr, you are familiar with the way a concrete floor is put in, are you not?

A. Yes, I saw them put in—I don't know whether it's right or not.

(Testimony of Burton E. Carr.)

Q. Will you describe to the jury what kind of forms were put in?

A. They just blocked off with two-by-four's all around the place—and then they poured that one section—and when they got that section leveled off, they went to the next one.

Q. How many sections was the floor poured in?

A. I don't recall, but I believe either six or eight, I couldn't recall.

Q. It was not a solid pour, then, for 50 by 100 feet?

A. No, there was around about—I imagine about 25 feet square.

Q. When you refer to a square, now, Mr. Carr, do you mean before the concrete was poured. Two-by-four's, or other boards, were put up so there would be a form for this concrete, 25 by 25 feet?

A. Right.

Q. Do you know how those forms were put in?

A. I don't remember seeing how they put them in. I didn't see that when they were putting them in, except it looks as though they were just laid in there, because they was moveable—because when they was putting this concrete—one of [314] them grabbed one and set it down. How they knew how far that was to be set down, I don't know.

Q. Were those forms or strut boards put in by instrument?

A. I couldn't tell you that.

Q. You don't know?

A. I don't know if they was put in by instruments, no.

(Testimony of Burton E. Carr.)

Q. Is there an expansion joint between the concrete slabs, Mr. Carr?

A. Yes, there is one inch expansion joints put in there, which looks very ugly on the floor.

Q. Were those required?

A. They shouldn't be that wide, because when you roll the jack over them, you can't move any car over them at all.

Q. How are the other joints?

A. All over the building that same way.

Q. They are all an inch?

A. They are all an inch, because when they got wet it spread out about an inch or an inch and a quarter.

Q. When you say they got wet, what are you talking about?

A. Well, when they poured one originally, they put that in, and they poured the other concrete to the other one—and a certain amount of moisture caused it to swell.

Q. Do the boards swell?

A. Cellotex is what he used. One-inch cellotex, and I don't believe you are supposed to use cellotex. I believe if [315] you use anything like that, it should be real thin. I never seen any other building poured that way.

Q. Mr. Bell, in asking you a question—as I recall—said the floor was so uneven you would trip over it. Is that correct?

Mr. Bell: Object to that statement.

A. Well, I believe you are taking it a little fur-

(Testimony of Burton E. Carr.)

ther along than what he said. You wouldn't exactly trip over it, but it's wavy—it's in bad shape.

Q. Well, describe what kind of shape it is in, Mr. Carr?

A. Well, when it starts in raining there, we have to have fellows with three or four brooms sweeping water out so they can work—and some of the floor in the boiler room, at least two and one-quarter inches, it even runs out the drain, and you have to use boards to step on to clean out the furnace.

Q. Does that water down in the furnace room stand there all the time?

A. Until we sweep it out into the place it's supposed to go.

Q. How far out of pitch is the floor, Mr. Carr?

A. You say out of pitch?

Court: Out of level.

Q. Out of grade, we will say.

A. I couldn't tell you that. I know when you pour water out, it don't go down the sewer or where it is supposed to. [316]

Q. What do the specifications require as to grade?

A. I couldn't tell you that. I know it's supposed to be a certain grade.

Q. Do you know whether the floor complies, or does not comply, with that grade?

A. Well, it wouldn't comply. He probably got a grade there, but it's so uneven that the water stands and don't run down. It's supposed to be so the

(Testimony of Burton E. Carr.)

water will run off, and it don't do it, so evidently he hadn't got any particular grade.

Q. Does water stand all over the whole floor?

A. No, all over—spots here and there where the fellows are working—and practically everyplace on the floor, except right over the drain.

Q. The water will just stand there?

A. Yes, just stand there.

Court: I think we will suspend now.

Mr. Kurtz: Your Honor, may I ask one question? Mr. Arnell, I believe, asked the witness whether he would be able to furnish some evidence on the dates certain fixtures were delivered on the site. For example, the hoist, and the washmobile, and the compressor, and so forth. I don't believe it was made clear as to whether Mr. Carr is going to furnish evidence on the delivery of the fixtures, and I was wondering what the status of that is? [317]

Court: No doubt you will give us any information you have on that, Mr. Carr. Bring it in this afternoon.

Mr. Carr: Yes.

Mr. Kurtz: I think Mr. Arnell requested him to bring information in this afternoon, but I don't know whether he agreed to do that.

Mr. Carr: I have one piece of paper here with some information on it, and the rest of them I doubt if I can get—I will tell you why. I can prove they was done at the right time, but the compressor, and the hoist, and the lube equipment, and all, is on a Union Oil contract. We leased this material

(Testimony of Burton E. Carr.)

from Union Oil Company, and the bills would probably be in Seattle, or some place, on that.

Court: Would you have any bills?

Mr. Carr: I can just show you where we were paying the lease on it, but I have a bill in my pocket. It is a freight bill for some of the stuff—it was all delivered to the garage at the same time. It arrived in Anchorage on March 4th, 1950, but when it was picked up—it was picked up later than that.

Court: Will you bring in this afternoon, any papers or give us any papers you have yourself, or can secure from the Union Oil Company on the subject, or from anybody else? The trial will be continued until 2:00 o'clock this afternoon, and the jurors will remember the admonitions of the Court as to duty. The court will recess until 1:30, at which time there is [318] another trial before the Court. The court will stand in recess until 1:30.

Whereupon at 12:02 o'clock, p.m., the trial of the above entitled cause was continued until 2:00 o'clock, p.m.

Be It Further Remembered, That at 2:00 o'clock, p.m., the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: The witness, Mr. Carr, may resume the

(Testimony of Burton E. Carr.)

stand. Counsel for plaintiff may proceed with examination.

Q. Mr. Carr, is the floor, that we were discussing just before noon recess, cracked, or otherwise shifted out of shape?

A. I don't recollect any cracks, except those ones where they are connected together with about an inch or an inch and a quarter variation—what they call the expansion joint—I believe that's what they call it. If you try to rule a jack over it, it gets caught on there, and you got to give an extra push—it don't go over smooth. We can't use some of our instruments on account of the crack.

Q. Are those 25 foot blocks, that you described this morning, cracked or out of grade?

A. No, the reason it's out of line—when they leveled it off [319] with two-by-four's, they tried to find a straight one, and whenever the two-by-four had a concave, it would show that concave all over the floor.

Q. Are all of those blocks, that you described this morning, in the same condition, or are some of them relatively free of depressions?

A. They all got depressions all the way through.

Q. Are they large, or small, depressions?

A. Large depressions. As I said before, water stands on there and you have to keep sweeping it all the time—and in rainy weather, the mechanics lay their tools down, and they get their overalls all wet—and it's pretty miserable.

(Testimony of Burton E. Carr.)

Q. Is that condition worse in the winter than in the summer? A. Just when it rains.

Q. How about snow and ice? Does that have any effect?

A. The same way with snow—it goes into water and it's all the same.

Q. I believe you testified yesterday, Mr. Carr, that this floor would have to be taken out. Is that correct?

A. To be correct, it would—yes.

Q. Since the building was built, you have sold it, have you not?

A. Yes, I have.

Q. Did you testify yesterday, that you would have to correct the floor, or were you referring to some of these other [320] conditions?

A. I didn't specify which detail I was going to correct. I said the building would be put in the specifications that were called for. It would be put in that condition.

Q. Did you inform Mr. Akers that you would tear out the floor and put in a floor for him?

Mr. Bell: Object as incompetent, irrelevant and immaterial what he told Mr. Akers.

Court: Overruled.

Q. What was your answer to that question, or did you answer?

A. I didn't tell him anything specifically I was going to do, but I told him I would put it to where the building would be up to the specifications of the contract.

(Testimony of Burton E. Carr.)

Q. Did you point out to him these other defects, that you have described to the jury?

A. I pointed out a number of defects.

Q. When you say defects, do you mean deficiencies in the contract, or conditions that you felt that you should complete for this sale to Mr. Akers?

A. The sale has already been made, as I say, but the building will have to be put in the condition to what the contract is.

Q. Is that in writing, Mr. Carr—your agreement with Mr. Akers? A. Yes, it is.

Q. When was that agreement made? [321]

A. When I sold.

Q. Was that February of this year?

A. It was March 1st of this year.

Q. Was that agreement that you have referred to a part of the Real Estate Contract of sale?

A. Yes, it was.

Q. In other words, it was a part of the agreement whereby you agreed to sell the building and the business to Mr. Akers for so much money. Is that right?

A. It was all in one lump sum. It wasn't any specific—so much for the business and so much for parts and equipment. It was all one lump sum.

Q. I mean, what you agreed to do to place the building in this condition you have described, was included in that agreement, was it?

A. Yes, the condition it should have been in when it was built.

Q. Yesterday, Mr. Carr, you described the front

(Testimony of Burton E. Carr.)

window glass as, in your opinion, being unsafe, did you not? A. Yes, it is very unsafe.

Q. Has the glass ever fallen out?

A. Well, could I explain this—I mean, could I explain the way the glass fits?

Q. Just answer my question first.

Court: Has it ever fallen out? [322]

Mr. Carr: It hasn't fallen out yet—no—it's just about to any day.

Q. You made reference, yesterday, Mr. Carr, to the fact that if there was an explosion it would fall out, did you not?

A. It wouldn't take much of an explosion, because it is only resting on two sides—if you look right straight up at the top there, it is all shimmied in—it is hitting about an eighth of an inch on the top to hold that big glass—and the same down below—an eighth of an inch all the way up—and when the wind is blowing that thing vibrates back and forth—and we had to put some braces on the window during that heavy wind last winter.

Q. Mr. Carr, have the concussions resulting from anti-aircraft fire affected that window?

A. It vibrates, yes, sure.

Q. But did the concussion cause those glasses to fall out of the moldings?

A. Well, it vibrates.

Q. You didn't answer my question. Would you answer it please?

A. It depends on how close it would be—it wouldn't cause it to fall out unless it got real close.